No. 2898

United States
CIRCUIT COURT OF APPEALS
For the Ninth Circuit

SANBORN-CUTTING COMPANY,
a corporation,
Appellant,

vs.

V. A. PAINE, as Trustee of the Kake Trading and Packing Company, a corporation, Bankrupt,
Appellee.

BRIEF FOR APPELLANT—Sanborn-Cutting Co.

On Appeal from the District Court of the United States for the District of Oregon
Hon. R. S. Bean, District Judge

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Filed this ..... day of ..... 191....

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

On the 6th day of December, 1915, the appellee, as Trustee of the Kake Trading and Packing Company, bankrupt, instituted a suit in the District Court of the United States for the District of Oregon, as plaintiff, against F. P. Kendall, George W. Sanborn, S. S. Gordon, Kake Packing Company, a corporation,

and the appellant Sanborn-Cutting Co., a corporation, as defendants.

On the same day, the appellee, as Trustee of the Kake Trading and Packing Company, also instituted another suit in the District Court of the United States for the District of Alaska, Division No. 1, at Juneau, as plaintiff, against the Kake Packing Co., a corporation, and appellant Sanborn-Cutting Co., a corporation, as defendants. Process was served upon the appellant Sanborn-Cutting Co. in each case, and it appeared and filed its answer in each case.

The causes of suit set forth in the two complaints are entirely dissimilar in theory, although they relate to and cover the identical transaction.

The suit instituted in the District Court of the United States for the District of Oregon sets up substantially the following cause of suit, namely:

After alleging the fact that the suit is instituted on behalf of himself, as Trustee of the Kake Trading & Packing Company, a corporation, bankrupt, and for and on behalf of all of the stockholders of the Kake Packing Company similarly situated, and after alleging the incorporation of the Kake Trading and Packing Company and its bankruptcy, and the appointment of appellee as Trustee and his qualifications, and the incorporation of the Kake Packing Co. and of the appellant, it is alleged

(1) That one Ernest Kirberger was at all the times mentioned, the President and General Manag-

er of the Kake Trading and Packing Co., and the owner of the majority stock thereof, and as such conducted and carried on the business of such corporation, and had so conducted such business for a long number of years prior to the 9th day of April, 1915, and that it had become possessed of certain lands, buildings and water rights and other property valuable in the fishing and packing industry, and had been engaged in the business of mild curing fish.

(2) That on February 19, 1912, Kirberger, Sanborn, Kendall and Gordon organized the Kake Packing Co., with a capital stock of $50,000.00, divided into 500 shares, each of the par value of $100.00. That Kendall subscribed and paid for 85 shares; Gordon subscribed and paid for 60 shares; F. H. Sanborn subscribed and paid for 10 shares; Geo. W. Sanborn subscribed and paid for 85 shares; G. C. Fulton subscribed and paid for 20 shares; and A. C. Kirberger subscribed and paid for 60 shares. That Kirberger personally subscribed for 125 shares, and that he paid for such shares by causing the Kake Trading and Packing Company to transfer to the Kake Packing Co. certain lands, buildings and water rights and other property then owned by the Kake Trading and Packing Company, at the agreed price of $8500.00, the balance in cash belonging to the Trading Company. Hence, it is alleged that the stock belonged to and was the property of the Trading Company.

(3) It is then alleged that on the 14th day of January, 1914, the defendants Kendall and Sanborn, for the purpose of depriving the Trading Company of its 125 shares of stock, fraudulently induced Kirberger to assign the same to them; that said assignmen was without any consideration whatever and a fraud upon the Trading Company.

(4) It is then alleged that on May 11, 1914, the Kake Packing Co., whose stockholders and directors were Geo. W. Sanborn, Kendall, Gordon, Fulton and F. H. Sanborn, through the fraud of Sanborn, Kendall and Gordon, transferred the assets of the Kake Packing Co. to the Sanborn-Cutting Co. without any consideration whatever, for the purpose of defrauding the stockholders, and that such transfer had that effect.

The prayer of the complaint is that the Sanborn-Cutting Co. be required to make an accounting of its operation and conduct of the Kake Packing Company, and be required to restore and return the business and assets thereof and earnings thereof to the Kake Packing Co., and to account to the Kake Trading and Packing Company for the 125 shares of stock, and also that the Kake Trading and Packing Company have judgment against Sanborn, Kendall and Gordon for $12,500.00, and for a reconveyance from the Sanborn-Cutting Co. of all property conveyed to it by the Kake Packing Co.

It will thus be observed that the suit is in the nature of a suit brought by a stockholder to have

set aside a sale of the assets of the corporation and for an accounting.

To this complaint, the appellant filed its separate answer, wherein it denied specifically all the allegations of fraud, and (1) admitted the transfer to it of the assets of the Kake Packing Co., but alleged that the same were transferred to it for a valuable consideration, which it paid; in fact, for a consideration far in excess of the actual value thereof. That the value of the assets of the Kake Packing Co. did not exceed the sum of $60,000.00, and that it paid therefor, as a matter of fact, $81,-177.18, an excess of $21,177.18 above the fair and reasonable value thereof.

(2) The appellant also set out fully the facts pertaining to the transaction, showing that the sale was made at the request of Kirberger, who voted the stock in his name, which it was claimed belonged to the Trading Company, and forwarded the sale to it, and who was at that time the President and General Manager of the Packing Company, and it was through his efforts that the sale was consummated, and that the stock owned by the Trading Company voted favorably to the sale.

(3) It is further alleged that immediately upon the assignment of the assets of the corporation which occurred on May 11, 1914, the appellant took possession of the property assigned to it, and has been in possession ever since.

(4) The appellant disclaimed ownership of 125 shares of the Kake Packing Company, and alleged the same has always been in the name of Kirberger, and that Kirberger always voted it at all stockholders' meetings.

The evidence offered at the trial of the case wholly failed to sustain the allegations of the complaint in the above mentioned case, that is, the suit instituted in Oregon, the appellee have failed to prove fraud, or failure of consideration, or inadequate consideration, and it having been proven that Kirberger, who voted the stock for the appellee, voted in favor of the sale, and that the sale was honestly and fairly made and the proceedings were honestly and fairly conducted, this suit naturally failed. In fact, the Court below in its opinion employed the following language, namely: (pg. 152, abstract).

> "The defendant Gordon took no part in the transactions out of which this controversy arose, and as to him, the suit should be dismissed without cost. The pleadings abound in charges of fraud and misconduct on the part of defendants Sanborn and Kendall, but such charges are not sustained by the testimony. The evidence shows quite clearly that there was no actual fraud or moral turpitude in any of the transactions involved in this suit, but that all

parties concerned, including Kirberger, acted in the utmost good faith and with no intention to wrong any one. The only question is the legal effect of what they did."

It shall be our contention that the evidence was wholly insufficient to sustain the allegations of the complaint in the Oregon suit.

ALASKA SUIT

The suit instituted in Alaska, as we have stated, is based upon an entirely different theory and different state of facts. The complaint in that case, page 167, abstract, alleges:

(1) That the appellee, as Trustee of the Kake Trading and Packing Company brings the suit on behalf of himself, as Trustee, and on behalf of other creditors of the Kake Packing Company similarly situated.

(2) It is then alleged that the Kake Trading and Packing Company was on April 9, 1915, adjudged a bankrupt, and the appellee was appointed Trustee and qualified as such.

(3) It is then alleged that on August 27, 1915, (the date is important), at Juneau, Alaska, a judgment was rendered in the sum of $10,333.31, with interest at the rate of 8 per cent. per annum from the

31st day of January, 1915, in a certain action therein brought by the appellee against the Kake Packing Company, and that on August 31, 1915, an execution was issued on such judgment and returned unsatisfied.

(4) It is then alleged that on May 12, 1914, the Kake Packing Company was wrongfully, unlawfully and fraudulently dominated and controlled by the Sanborn-Cutting Co., and being so dominated, it wrongfully, unlawfully and fraudulently, and with intent to hinder, delay and defraud the creditors of Trading and Packing Co., and to defraud the Kake Trading and Packing Company, conveyed to the Sanborn-Cutting Co. the real and personal preperty involved in this suit, being the entire asets of the Kake Packing Co.

(5) It is further alleged that although the conveyance purports to have been made for the alleged consideration of $72,621.01, in truth and in fact, the appellant was not a bona fide purchaser, and did not pay a valuable, or any, consideration for the property assigned, but, on the contrary, it took the property with full notice and knowledge and with fraudulent intent and purpose from the Kake Packing Co., and with intent to defraud the creditors thereof.

(6) It is further alleged that Sanborn and Kendall, of the directors of the Kake Packing Co., were also directors of the Sanborn-Cutting Co.

Although the prayer of the complaint does not really correspond with the allegations of the com-

plaint, the effect thereof is substantially that the appellant Sanborn-Cutting Co. be required to pay the judgment, and in case of failure to do so, the appellee have judgment against the Sanborn-Cutting Co., Gordon, Sanborn and Kendall, for the amount thereof.

To this complaint the Sanborn-Cutting Co. interposed an answer, by which it denied all the acts of fraud charged against it, and alleged:

(1) That it purchased the assets of the Kake Packing Co. in good faith and for a valuable consideration, and that the consideration thereof was that it should pay and satisfy all of the indebtedness of the Kake Packing Co., excepting a claim that the Kake Trading and Packing Company had against it, which it represented to amount to $8582.21, and that the Kake Trading and Packing Company being one of the creditors of the Kake Packing Co. agreed to this arrangement and had assigned its claim to Sanborn and Kendall. That the property assigned to appellant was not worth to exceed $60,000.00, but that it agreed to take the property over and to pay all the debts, which at that time were represented to aggregate the sum of $71,621.01, exclusive of the claim of the Kake Trading and Packing Company. That the Kake Trading and Packing Company induced the Sanborn-Cutting Co. to take over the assets of the Packing Co., and the main inducement for the purchase was the cancellation of the claim of the Trading Company against the Packing Co., or

rather the assignment thereof to Sanborn and Kendall, who agreed to satisfy it and which they subsequently did. That the transfer was made on May 11, 1914, and immediate possession was taken, and that appellant had been in possession ever since. The history of the transaction is fully set forth in the answer.

(2) The appellant further alleged that the judgment set forth in the complaint was fraudulent and void, in that it was based upon the claim of the Kake Trading and Packing Company which had been theretofore assigned to Sanborn and Kendall by the Kake Trading and Packing Company on January 6, 1914, and was not owned by the Trading Company at the time, and did not pass by the proceedings in bankruptcy.

(3) It is then alleged that the appellee was wrongfully claiming to have an interest in the property assigned to it, thereby creating a cloud upon said property in the appellant.

(4) It is further alleged that Kirberger was the owner of all of the stock in the Trading Company and had full power and authority to transfer the account above mentioned.

At the trial of the case it was agreed that the two causes of suit should be consolidated, but that the pleadings should remain the same and considered as filed in the Court below, and that the allegations of both of the complaints should be tried the same as

if both suits had been instituted in the Court below, and neither party to take advantage of the informal manner in which the case should be tried.

It will be observed that the case in the Alaska suit is based entirely upon a judgment obtained by the appellee against the Kake Packing Co., and it is in the nature of a creditor's suit, and in order to sustain the suit, under the practice in Oregon and in other states as well, it was incumbent upon the appellee to clearly establish his judgment. If the judgment fails, his suit must necessarily fail.

Now, it will be one of our contentions that the judgment was void as to this appellant.

It is admitted in the pleadings in the case that this claim upon which the Alaska suit was based had been, long prior to the time the action was instituted, and long prior to the time the judgment was entered, assigned to F. P. Kendall and Geo. W. Sanborn, and the actual assignment is admitted to have been made by the Kake Packing and Trading Company, and it is admitted that the assignment was in writing and properly executed. (Pg. 87, abstract). But the contention is made that it was fraudulent—not void, but fraudulent—in that, first, it was without any consideration, and, second, that Kirberger, who was the President and General Manager and owner of all of the stock in the corporation, did not have power or authority to make the assignment. The Court below held that Kirberger, who was the General Manager of the corporation, and its Presi-

dent, and, in fact, its entire controlling force, and who was the owner of all of the stock of the corporation, and who had for many years prior thereto transacted all of the business of the corporation without any meeting of the directors or stockholders thereof, did not have authority to assign this claim of the Trading Company against the Packing Company,and, consequently, because of the fact that F. P. Kendall and Geo. W. Sanborn were stockholders and directors of the appellant and stockholders of the Kake Packing Co., as to the claim of the Trading Company, the transfer was, as a matter of law, invalid.

The Court below held that there was no consideration for the transfer, and that it was not made with the authority of the directors of that company. The Court below, evidently, overlooked the controlling decision in its jurisdiction on this point, namely, Pacific State Bank v. Coats, 205 Fed. 621.

The evidence covers a wide range, yet there is practically no controversy as to the material facts. Indeed, we believe there is no dispute as to any material fact in this case. As we read the record, the material facts are substantially as follows:

FIRST: That the Kake Trading and Packing Company, which we have heretofore and will hereafter refer to as the Trading Company, is a Washington corporation. It was incorporated and organized under the laws of Washington during the year 1904, with a capital stock of $25,000.00, divided into

25.000 shares, of the par value of $1.00 per share. At its organization Ernest Kirberger subscribed for one share; one F. C. Sepp also subscribed for one share, and E. B. Burwell subscribed for the remaining shares, namely, 24,998, and paid for the same by transferring to such corporation, among other things, a portion of the property which such corporation subsequently conveyed to the Kake Packing Co. hereinbefore mentioned. Burwell in fact owned all the stock in the Trading Company, the stock in the name of Sepp and Kirberger being subscribed and held by them for him. Upon the organization of such corporation, it opened up and conducted a general merchandising business at Kake, Alaska, also engaged in the business of salting, mild curing salmon and dealing in furs. Sepp and Kirberger being clerks therein, employed by the corporatoin.

Subsequently, but long prior to 1912, (pg 6, abstract) Kirberger acquired all the stock in the Trading Company and became sole owner thereof, and personally took charge of and transacted all the business, which consisted of the operation of a general mercantile store and business connected therewith at Kake, Alaska, and salting and mild curing fish and dealing in furs. No attention was paid to the stockholders or directors. In fact, no meeting of either took place between February, 1912, and the latter part of the year 1915. The latter meeting was held for the purpose of providing for proceedings in bankruptcy. Whilst Kirberger was the owner of the Trading Company and operating it in Alaska, he

conceived the idea of securing the construction of a salmon cannery plant there. He took up the proposition of securing one, and after many unsuccessful attempts, he finally became acquainted with defendants Sanborn and Kendall, which resulted in the organization of the Oregon corporation by the name of Kake Packing Co.

The Kake Packing Co., which we have hereinbefore and will hereafter refer to as the Packing Co., as distinguished from the Kake Trading and Packing Company, was incorporated and organized under the laws of the state of Oregon on February 19, 1912.

The incorporators of this corporation were Ernest Kirberger, S. S. Gordon, F. P. Kendall and Geo. W. Sanborn, with a capital stock of $50,000.00, divided into 500 shares, of the par value of $100.00 each. Ernest Kirberger subscribed for 125 shares, which he paid for in the following manner: $8500.00 thereof by delivering to the Kake Packing Co. a deed executed by the Kake Trading and Packing Company for a tract of land which had been theretofore conveyed to the Trading Company by E. B. Burwell in part payment for his subscription for 24,998 shares of stock which he subscribed for in such corporation. The balance of such stock subscribed, namely, $4000.00, was paid as follows: After the organization of the Packing Co., it constructed a cannery at Kake, Alaska, near the general merchandising store belonging to the Trading Com-

pany, on the ground the Trading Company had conveyed to it as aforesaid. This cannery was built prior to the fishing season of the year 1912. During its operation, it purchased from the Trading Company supplies, aggregating $4000.00. The Packing Co. then executed and delivered to the Trading Company its check for $4000.00. Kirberger utilized this check of $4000.00 in payment of his stock subscription in the Packing Co.

S. S. Gordon subscribed and paid cash for 60 shares; Geo. W. Sanborn subscribed and paid cash for 85 shares; F. P. Kendall subscribed and paid cash for 85 shares; A. C. Kirberger, a brother of Ernest Kirberger, subscribed and paid cash for 60 shares; F. H. Sanborn subscribed and paid cash for 10 shares; and G. C. Fulton subscribed and paid cash for 20 shares.

The undisputed evidence shows that the corporation was organized in perfect good faith, in the ordinary course of business, and no advantage was taken of any one, much less attempted.

As we have stated, a salmon cannery was constructed by the Packing Co. early in the year 1912, but prior to the fishing season for that year, and the cannery was operated during that year by Ernest Kirberger. He was the only officer residing in Alaska, and his general merchandising store was very close to the salmon cannery. The other subscribers, with the exception of A. C. Kirberger, resided at Astoria, Oregon. During the year 1912,

the cannery was operated at a loss. During the salmon fishing season for the year 1913, the cannery was again operated by Ernest Kirberger, and, at the end of the season, it was discovered that the books showed an indebtedness of the Packing Co. in the sum of $72,621.01, exclusive of an indebtedness to the Trading Company represented to be $8582.21, making its total indebtedness, as shown by the books, of $89,759.34.

The assets of the Packing Co. at that time were not to exceed in value $60,000.00, and were consequently insufficient to satisfy the indebtedness.

The evidence also shows, without any contradiction, that practically all of the indebtedness of the Packing Co. was guaranteed by either Kendall or Sanborn, or both, with the exception of the amount due the Trading Company.

During this time, the officers of the corporation were Ernest Kirberger, President; F. P. Kendall, Vice-President; and Geo. W. Sanborn, Secretary. The directors were Ernest Kirberger, F. P. Kendall, Geo. W. Sanborn, S. S. Gordon and G. C. Fulton. S. S. Gordon went off the Board of Directors after the first of January, 1913, and took no part whatever in subsequent transactions of the corporation. The stockholders remained unchanged.

On January 6, 1914, at the request of Ernest Kirberger, an agreement was entered into between himself on the one part, and Sanborn and Kendall on the other, whereby it was agreed that Sanborn and

Kendall, and they did actually, give Kirberger an option to purchase all of the stock of the Packing Co. owned by Gordon, Kendall the two Sanborns and Fulton, at the agreed price of $65,000.00, with an agreement on the part of Sanborn and Kendall that with the $65,000.00 they would pay the entire indebtedness of the corporation, excepting the amount due the Trading Company, namely, $8582.-21, and in consideration of Kendall and Sanborn paying the entire indebtedness with this $65,000.00, Kirberger, on behalf of the Trading Company, agreed to assign and transfer to Sanborn and Kendall the claim of said Trading Company against the Packing Co. in the said sum above mentioned. This would leave Kirberger the owner of the entire corporation, with the indebtedness entirely satisfied. The agreement further provided that if Kirberger failed to pay this $65,000.00 within the time limited, Sanborn and Kendall would become owners of the 125 shares of the Packing Co. then owned by Ernest Kirberger, and that Ernest Kirberger would have assigned to them the 60 shares of the capital stock of the Packing Co. then owned by his brother, A. C. Kirberger, and would also have the Trading Company assign to Kendall and Sanborn the $8582.21 claim of the Trading Company against the Packing Co., in consideration of which Sanborn and Kendall agreed to satisfy and discharge all of the indebtedness of the corporation.

Kirberger failed to accomplish the sale of the cannery to his eastern friends. The result was that a special meeting of the stockholders of the Packing Co. was held at its office on May 11, 1914. At this meeting, it was mutually agreed between all of the stockholders that the entire assets of the Packing Co. should be sold to the Sanborn-Cutting Co., an Oregon corporation, in consideration of the Sanborn-Cutting Co. paying the entire indebtedness of the corporation, excepting the claim of the Trading Company, which had been assigned to Sanborn and Kendall and owned by them, it being the understanding that this claim should be delivered up to the Sanborn-Cutting Co. as fully paid and discharged. Accordingly, a special meeting of the stockholders was called for the purpose of providing for the sale of the assets of such corporation and held on May 11, 1914. All of the stockholders of such corporation were present, and a resolution was adopted authorizing the sale and directing the officers to make the necessary conveyances, which was accordingly done on that date. Ernest Kirberger representing the Trading Company, was present at such meeting, and voted the 125 shares in question in favor of the sale, and urged the sale, also waived payment of the claim of the Trading Company against the Packing Co. The appellant took immediate possession of the assets, and has been in possession ever since. It operated the cannery during the years 1914 and 1915. As a matter of fact, however, the indebtedness of the corporation, exclusive of the Trading

Companys claim, instead of being only $72,621.01 aggregated the sum of $81,177.18. This sum was paid by the Sanborn-Cutting Co.

The evidence also shows, without any substantial contradiction, and it was so found by the Court below, that the entire assets of the Packing Co., which were transferred to and received by the Sanborn Cutting Co., appellant herein, did not exceed $60,000.00. Consequently, the appellant actually paid in cash a sum equal to $21,177.18, in excess of the fair value of the property transferred to it.

The evidence also shows that the transfer was not in any manner tainted with fraud, but that it was an honest transaction. There is no testimony or evidence in the record showing, or tending to show, that Sanborn or Kendall, or the Sanborn-Cutting Co. had any notice or knowledge that the Trading Company was insolvent, or in anywise involved, but were under the impression that it was a solvent concern. It was actively engaged in business and continued so for practically a year thereafter.

The assignment of the claim of the Trading Company against the Packing Co. of $8582.21 was made in January, 1914, and later ratified by the President and owner of the entire corporation on May 11, 1914, at the time of the actual transfer of the assets of the corporation to the appellant herein. It was further represented that the total indebtedness of the Packing Co. to the Trading Company was $8582.21, and no more.

There was no meeting of the directors or stockholders of the Trading Company concerning such transaction. The appellant at that time being of the opinion that Kirberger being the owner of all of the stock in the corporation and general manager of the business of the corporation, who had exercised all the power and authority of the corporation for many years, had the power and authority to make this transfer, and did not deem it necessary that he should go through the farce of calling a meeting of the Board of Directors, consisting of himself and his two clerks, and solemnly adopting a resolution approving the action of the President, who actually owned all the stock. This would be like meeting with ones self. So such meeting was never called. But the transaction was never disaffirmed by the corporation until creditors of the Trading Co. got hold of Kirberger, who was, as it appears, an invertebrate, and induced him to disaffirm his acts.

The evidence shows that Sanborn nor Kendall, had knowledge as to the manner in which the stock in the Packing Co. was paid. They knew that Kirberger controlled and conducted the affairs of the Trading Company as if it were practically and peculiarly his business and that it was owned exclusively by him, and it was a-going concern and reputed to be entirely solvent.

The evidence also shows that on **April 9, 1915,** the Trading Company filed its petition to be adjudicated a bankrupt in the District Court of the

United States, for the District of Alaska, Division No. 1, at Juneau, and subsequently, and on May 8, 1915, it was duly adjudged a bankrupt and the appellee herein was appointed Trustee in Bankruptcy, and he duly qualified as such.

It will be observed that the Trading Company was not adjudged a bankrupt until practically one year after the transfer of the assets of the corporation to the appellant complained of herein.

The evidence also shows that on August 25, 1915, one year and two months after the transfer of the assets of the Packing Co. to the appellant, the appellee, as Trustee in Bankruptcy of the Trading Company, obtained the judgment against the Packing Co., in the District Court of the United States, for the District of Alaska, in the sum of $10,333.31, and that execution has been issued upon such judgment and returned unsatisfied.

It is an admitted fact in this case that the claim sued upon in that case is the same claim that the Trading Company assigned to Sanborn and Kendall, namely, the claim of $8582.21. Included in which, however, was the additional claim of $1750.00, which was in the $8582.21, the entire claim having been assigned. But, as stipulated by counsel for appellee, pg. 295, abstract—"Yes, we admit, the identical claim as far as we know represented by the assignment put in evidence this morning."

There was no evidnce showing, or tending to show, that a single creditor of the Kake Trading

and Packing Company at any time filed, or presented for filing, either with the Referee or Trustee in Bankruptcy of such corporation any claim of any kind against such corporation, nor was there any evidence showing, or tending to show, that the assets of the Trading Company were insufficient to pay in full the claims filed. Indeed, this was impossible, for the reason no claim of any kind was filed.

It shall be one of our contentions that before a Trustee in Bankruptcy can maintain a suit to avoid a transfer of property by the bankrupt, it must be at least proved that the assets of such estate are insufficient to satisfy the claims filed.

This cause was tried before Honorable Robert S. Bean, District Judge, resulting in a decree in favor of the appellee and aginst the appellant alone, for the sum of $6688.87, with interest thereon from the 12th day of May, 1914, until paid, neither party to recover costs. The suit was dismissed as to Sanborn, Kendall and Gordon. From this decree, Sanborn-Cutting Co. prosecuted an appeal to this Court.

The Court below held—

FIRST: That there was no evidence of fraud on the part of either the appellant, Kirberger, Sanborn, Kendall or Gordon. On the contrary, explicitly found and decreed that the entire transactions complained of were entered into and carried on and completed in the utmost good faith. This holding, of course, we do not question.

SECOND: That at the time of the assignment by the Trading Company to Sanborn and Kendall of its claim against the Packing Co., the Trading Company was **practically** insolvent, or, at least, was made so by the assignment. This we claim was error.

THIRD: That the attempted assignment of the claim of the Trading Company against the Packing Co. was without consideration and was, therefore, void, as a matter of law, as to the Trustee in Bankruptcy, although he may represent only creditors who have become such after the date of the assignment. This we claim was error.

FOURTH: That Kirberger, although the President and General Manager and owner of all the stock of the Trading Company, did not have power or authority to assign the claim of the Trading Company against the Packing Co., without authority from the Board of Trustees of the Trading Company, and that such authority could be obtained only at a meeting of such Trustees, and that no such meeting was ever held. This we claim was error.

FIFTH: That the transfer by the Packing Co. to appellant of the assets of such corporation was, as to the Trading Company, void, because of the fact such corporation was insolvent, and could not transfer its assets unless the entire indebtedness were paid, or the assets applied ratably to the indebtedness of such corporation, and that the consent of the Trading Company to such transfer and the waiver

by such company of its claim against the Packing Co. was void, and it was not estopped thereby to claim a participation in such assets. This we claim was error.

SIXTH: The Court further found that the indebtedness of the Packing Co. to the Trading Company, at the time of the transfer, was $10,333.31 instead of $8582.21. This we claim was error.

SEVENTH: The Court awarded judgment against appellant and in favor of appellee in the sum of $6688.87. This we claim was error.

EIGHTH: The Court allowed appellee interest on the amount found due, from May 12, 1914, until paid. This we claim was error.

NINTH: The Court below also held that the appellee could maintain this suit, even though there was no evidence showing or tending to show, that a single creditor of the Packing Co. had at any time presented or filed his claim against the estate of the bankrupt. This we claim was error.

TENTH: The Court below also held that the appellee could maintain this suit without proof that the assets of the Packing Co. were insufficient to satisfy the claims filed against the estate of the bankrupt. This we claim was error.

The following are the Assignments of Error upon which appellant expects to rely, which include the errors above mentioned, namely:

I.

That the Court erred in holding and adjudging and in entering a decree that the assignment by Ernest Kirberger to the defendants F. P. Kendall and George W. Sanborn of the account of $8582.21 due the Kake Trading & Packing Co., a corporation, from the defendant Kake Packing Co., a corporation, was null and void, and in adjudging and entering a decree setting aside such assignment, and in holding the same for naught.

II.

The Court erred in holding and adjudging and in entering a decree that the defendant Sanborn-Cutting Co. did receive the assets and property transferred to it by the Kake Packing Co., a corporation, subject to the indebtedness of said Kake Packing Co., amounting to $10,333.31, owing by said Kake Packing Co. to the Kake Trading & Packing Co., and in adjudging and decreeing that the defendant Sanborn-Cutting Co. received said assets and property as trustee for the benefit of the defendant Kake Packing Co., and in adjudging

and decreeing that plaintiff, as Trustee in bankruptcy, succeeded to the rights of the Kake Trading & Packing Co., a corporation, as creditor of said Kake Packing Co., and in adjudging and decreeing that plaintiff is entitled to a pro rata share, or any share, of such property and assets, and in adjudging and decreeing that plaintiff was entitled to any part or portion thereof, and in holding, adjudging and decreeing that the defendant Sanborn-Cutting Co. received such assets for the use and benefit of the plaintiff, or any person whomsover.

III.

The Court erred in holding and adjudging that the plaintiff was entitled to recover from the defendant Sanborn-Cutting Co. the sum of $6688.87, together with interest thereon at the rate of 6 per cent. per annum from May 12, 1914, and entering a decree to that effect, and in further adjudging and decreeing that plaintiff have and recover from the defendant Sanborn-Cutting Co. its costs and disbursements of such suit.

IV.

The Court erred in entering judgment and decree against the defendant Sanborn-Cutting Co. in the sum of $6688.87, or any sum or amount whatever.

V.

The Court erred in entering judgment against the defendant Sanborn-Cutting Co. for interest on the sum of $6688.87 from May 12, 1914, or from any date whatever, or any interest whatever.

VI.

The Court erred in failing, refusing to, and in not holding and adjudging and decreeing that the transfer and assignment of the assets of the Kake Packing Co. to the defendant Sanborn-Cutting Co. was lawful and was in good faith, and was for a valuable consideration and that the plaintiff had no interest therein or thereto, and that such transfer and assignment vested in the defendant Sanborn-Cutting Co. the title to said property, and divested the plaintiff of all claim, trust, or interest therein.

VII.

Th Court erred in failing, refusing to, and in not holding, adjudging and decreeing that the plaintiff was estopped from contending, alleging or claiming that he, as trustee, was entitled to question or set aside the assignment and transfer of the Kake Packing Co. to defendant Sanborn-Cutting Co.

VIII.

The Court erred in failing, refusing to, and in not holding that the acts of Ernest Kirberger, owner of all of the stock of the Kake Packing Co., were the acts and deeds of the Kake Packing Co., and binding upon such company.

IX.

The Court erred in holding, adjudging and decreeing that plaintiff was entitled to recover any judgment or decree in this case.

X.

The Court erred in not holding, adjudging, and in not entering a decree to the effect that the sale and transfer of the assets of the Kake Packing Co. to the defendant Sanborn-Cutting Co. was free from fraud, and was fairly and honestly made, and made for a valuable consideration, and that the said Sanborn-Cutting Co. is and was, since May 12, 1914, the owner of the whole thereof, and in not adjudging and decreeing that the plaintiff herein never at any time had any right, title, interest or estate therein or thereto, and in enjoining and restraining plaintiff from claiming to own any right, title, interest or estate of, in or to, or lien upon, or right to participate in, the assets of the Kake Packing Co., which

were on May 12, 1914, assigned and conveyed to this defendant, Sanborn-Cutting Co.

XI.

The Court erred in not entering a decree in favor of defendant Sanborn-Cutting Co. and against the plaintiff.

XII.

The Court erred in admitting in evidence over the objection of the defendant Sanborn-Cutting Co., and in not excluding from the evidence, Plaintiff's Exhibit "67a," being statement of the liabilities of the Kake Trading & Packing Co.

XIII.

The Court erred in not sustaining, and in overruling and denying, the motion of the defendant Sanborn-Cutting Co. to strike out all of Plaintiff's Exhibits "R," "S," "T," "U," "V," "W," "X," "Y," "Z," "AA," "BB," "CC," "DD," "EE," "FF," "GG," and "HH," and in receiving the same in evidence in said cause.

POINTS AND AUTHORITIES

I.

It is well settled that a Trustee in Bankruptcy does not take the property of the bankrupt as a bona fide holder for value, but as the bankrupt held it, namely, subject to all the valid claims, liens and equities.

Zarlman v. First. Nat. Bank, 216 U. S. 134; 30 Sup. Ct. 368.

And the validity of such claims, liens and equities is to be determined in the absence of Federal statutes by the local law, as evidenced by the decisions of the State Courts.

Thompson v. Fairbanks, 196 U. S. 516; 25 Sup. Ct. 306.

Knapp v. Milwaukee Trust Co., 216 U. S. 545; 30 Sup. Ct. 412.

II.

In order to maintain this suit, it was incumbent upon the appellee to have proven that the Estate of Kake Trading and Packing Company had not sufficient assets to satisfy the claims filed against such estate.

Mueller v. Bruss, 112 Wis. 406; 88 N. W. 229.

There is no evidence in the record showing, or tending to show, that a single claim had been filed

against the said Kake Trading Company, with the Referee or Trustee.

III.

The Federal Courts accept the construction of state statutes by the Courts of the state, as to all conveyances made in such state.

Peters v. Pain, 133 U. S. 670; 10 Sup. Ct. Rep. 354.

IV.

In Oregon, the rule is that in order to enable a creditor to maintain a suit to set aside a conveyance by his debtor as fraudulent, he must show an unsatisfied judgment or attachment upon a cause of action existing at the time of the conveyance, or a cause of action arising subsequent thereto, in which latter case, the conveyance must be shown to have been made with the express intention of defrauding subsequent creditors. No such evidence appears in this case.

Seed v. Jennings, 47 Or. 464.
Dawson v. Coffey, 12 Or. 513.

V.

It is well settled that the President, or other general officer of a corporation, has power prima facie to do any act which the officers of the corporation could authorize or ratify, and the burden of proof that such officer did not have such power in any given matter is upon the party denying the same.

Sun Printing Association v. Moore, 183 U. S. 642; 22 U. S. Rep. 240-244.

VI.

The record shows that every stockholder of the Kake Packing Co. voted in favor of the transfer of its assets to Sanborn-Cutting Co., including Ernest Kirberger, in whose name the 125 shares of stock were issued and held, and that the sale was for a consideration in excess of the value of such assets. Hence, the appellee cannot question the validity of such sale.

2 Thompson on Corporations (2nd ed.) §1981.

7 Thompson on Corporations (3rd ed.) §8045.

VII.

While it is true where one corporation sells its entire assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, and evidence of fraudulent intent or want of consideration is not necessary. The purchasing corporation takes such assets with notice of such claims, and subject to such equitable liens. This is the rule in Oregon as laid down in Williams v. Commercial National Bank, 49 Or. 492-498.

But a creditor of the selling corporation can either by express conduct or act waive his lien and right to subject such assets to the satisfaction of his

claim. It is the contention of appellant that the Trading Company both by contract for a valuable consideration and by its acts waived payment of its claim, and is also by its express contract and acts estopped from enforcing its claim against either appellant or the Packing Co.'s assets.

5 Elliott on Contracts, §4175.

Boisot on Mechanics Liens, §705.

Pokegama etc. Co. v. Klamath etc. Co., 96 Fed., 34, 35.

4 Words and Phrases (2nd ed.) pg. 1222.

8 Words and Phrases Judicially Defined, pg. 7375.

40 Cyc 252.

Marine Iron Works v. Weiss, 78 C. C. A. 279; 148 Fed. 145.

Swain v. Seamans, 9 Wall. 274; 19 L. Ed. 554.

There is a distinction between a waiver and an estoppel clearly recognized by the Supreme Court of Oregon.

Ward v. Queen City Ins. Co., 69. Or. 347, 353.

19 Cyc 793.

5 Elliott on Contracts, supra.

40 Cyc 252.

VIII.

The appellee could not recover interest on his claim under the laws of Oregon.

Sargent v. American State Bank, Or. 16.

Richardson v. Investment Co., 66 Or. 353, 358.

IX.

The evidence in this case shows, without contradiction, that Ernest Kirberger was the owner of all the stock of the Trading Company and was its President and General Manager, and had been such for many years, and conducted, managed and operated the business without consultation with any one, and no meeting of either the stockholders or directors was held for several years. Under such circumstances, the acts of Mr. Kirberger, as a matter of law, would be the acts of the corporation in all matters in which the corporation was interested.

McElroy v. Minn. P. H. Co., 96 Wis. 317; 71 N. W. 652.

Pacific State Bank v. Coats, 205 Fed. 618-620.

7 Thompson on Corporations, §8043-5.

Sun Printing Assn. v. Moore, supra.

X.

The Kake Trading and Packing Company having represented to the appellant that the total amount of its claim was $8582.21, the extent of

appellants liability, under any aspect of the case, would be 66 2-3 per cent. of that sum.

XI.

Constructive fraud will not support a suit by subsequent creditors to set aside conveyances. As to them the fraud must have been specific and actual.

Leavengood v. McGee, 50 Or. 233.

ARGUMENT

I.

We have assigned numerous errors. These we believe can be discussed without taking them up in the order in which they are stated, but a discussion of the few propositions presented by this appeal will better aid the Court in arriving at a conclusion than to pick up the various assignments and then discuss each one.

THE OREGON CASE

Under this head, we desire to discuss the suit originally instituted in the Court below, that is, the suit brought by the appellee against the appellant, F. P. Kendall, George W. Sanborn, S. S. Gordon and the Kake Packing Company. This suit is instituted by a stockholder. The only theory upon which the suit is based is, that the Trading Company, of which appellee is the Trustee in Bankruptcy, was the owner of stock in the Packing Co., and that the Packing Co., through its stockholders and officers, made a

wrongful and fraudulent transfer of the assets to the appellant.

The record shows, if the contention of the appellee is correct, namely, that the 125 shares of stock of the Packing Co. in the name of Ernest Kirberger was in fact the property of the Trading Company, that Kirberger unquestionably was the general agent of the Trading Company, and the Trading Company would be bound by his acts.

Now, the record shows, without any question, that the sale complained of was authorized at a stockholders' meeting of the Packing Co. expressly called for such purpose, and that Kirberger was present at such meeting; that he was the President of the corporation and the presiding officer at the meeting of the stockholders, as well as directors; that he urged the sale and transfer; that he voted in favor of the sale and transfer; and that he executed the conveyance which accomplished the transfer, and used his influence to accomplish the sale.

The principle is too well settled to require argument that the Trading Company cannot, under this state of facts, call in question the acts of the corporation complained of.

Professor Thompson, Section 1981, Volume 2, lays down the doctrine as follows:

> "The stockholders of a corporation may not question acts of the corporation taken with their knowledge and consent.

> It does not lie in the mouth of the stockholders to object to what the company has done, if the act which he complains of was taken with his knowledge and consent. He cannot be heard to complain that he has been injured by the doing of something which he knew of at the time and expressly consented to."

It is, perhaps, true that had Kirberger been guilty of fraud in the transaction, and that such fraud was contributed to by the appellant, the Trading Company might be relieved and might be able to call in question the fraudulent acts of its agent. There was absolutely no evidence in the case in this regard. The eminent jurist who tried this case in the Court below expressly so found. An examination of the opinion filed in the case demonstrates this contention. We quote from the part of the opinion of the Court in this regard, pg. 152, abstract, as follows:

> "The pleadings abound in charges of fraud and misconduct on the part of defendants Sanborn and Kendall, but such charges are not sustained by the testimony. The evidence shows quite clearly that there was no actual fraud or moral turpitude in any of the transactions involved in this suit, but that all parties concerned, including Kirberger, acted in the utmost good faith and with no intention to wrong anyone.

The only question is the legal effect of what they did."

Therefore, so far as the complaint of the appellee is concerned, originally filed in the Court below, it is out of this case, and needs no further consideration.

II.

THE ALASKA CASE

We refer to the suit instituted in the Alaska Court as the Alaska case, simply for the purpose of identification. This suit is based upon a judgment obtained by the Kake Trading and Packing Company against the Kake Packing Co., and an execution returned unsatisfied. It is, therefore, in the nature of a creditor's bill to set aside a fraudulent conveyance. The validity of the judgment gives the Court jurisdiction and unless this judgment is valid, this suit cannot prevail. The Trading Company, unless it has a valid judgment against the Packing Co., has no cause to complain of the acts of the Packing Co. It is only because it is a judgment creditor that it has any standing in Court, and, as we understand it, the rule of law pertaining to suits of this character is determined by the decisions of the state Courts. It is a familiar rule of law that a Court of Equity cannot give relief to a contract creditor in a suit brought by him to set aside conveyances in fraud of creditors. He must first arm himself with a judgment. This is fundamental. This rule is

announced in the case of Dawson v. Coffey, 12 Ore. 513. The appellant was not a party to the judgment in question. Therefore, it is at perfect liberty to deny its effect.

Now, the evidence in this case is clear that the claim upon which the judgment was based, at and long prior to the institution of the action and long prior to the entry of the judgment, had been, for a valuable consideration, assigned to F. P. Kendall and Geo. W. Sanborn, who claimed to own the claim. The assignment was executed by the President and General Manager of the Kake Trading and Packing Company, who had apparent authority to make the assignment. The assignment was unquestionably made in good faith, and it was made for a valuable consideration. Not only that, the Trustee in Bankruptcy was well advised of the fact of the assignment, and the date thereof. (pg. 87, abstract). This assignment was offered in evidence by the appellee at the trial of the case before the judgment was offered in evidence. We call the Court's attention to page 231, abstract of record, where Mr. Kirberger testified as follows:

> "On the same day, there was an assignment made of the store account. This is the original document. I think it was prepared by Mr. Sanborn and signed by myself."

The document was then offered and received in evidence as Plaintiff's Exhibit "61." This assign ment was not void on its face, and, in fact, was not

void under any circumstances or conditions. The pleadings on the part of the appellee do not show it to have been void. If we were to consider the appellee's allegations in that regard to be true, the assignment was merely fraudulent, but not void. Therefore, although the Trading Company may have been the equitable owner of the claim, it was not the legal owner, and, consequently, could not legally obtain a judgment thereon. The judgment would be as to appellant entirely void, for the reason that it dealt with the Trading Company upon the assurance on the part of the Trading Company that the assignment was valid, and had expended over $81,000.00 upon the honest belief that the assignment was valid. Therefore, upon the appellee's own showing, the judgment was entirely void as to the appellant. If our position is correct in this regard, this surely ends this case. Before the appellee could prosecute an action to recover on this claim, it would have been necessary for it to have first set aside the assignment of this claim by a suit in equity, or by some proper proceedings. Not having done so, it did not have the title to claim, and the judgment in consequence is void. While the judgment is for the sum of $10,-333.31, and the assigned claim amounts to only $8582.21, it was conceded at the trial of the case in the Court below that the judgment is the same claim assigned. This is the statement made by Mr. Robertson, attorney for appellee, page 295, appellant's abstract of record.

MR. ROBERTSON: Yes, we admit, the identical claim as far as I know represented by this assignment put in evidence this morning."

An examination of the record will show that the appellee attempted to prove the judgment by offering in evidence a certified copy of the journal entry of the Alaska Court. The appellant objected to the introduction of the instrument upon the ground that it did not show that the Court had jurisdiction. The judgment did not show that any complaint had been filed, or proceedings taken prior to the entry of this document. The objection was well taken. The complaint was not offered with the judgment entry, and, consequently, the judgment entry did not show what the judgment was for. In order to clear this matter up, a stipulation was entered into and some explanation was made in regard to the difference in the amount. The assignment, however, includes the entire claim of the Trading Company against the Packing Co. It was the intention to transfer the entire claim, and all parties so conceded it.

We, therefore, most respectfully submit that the record clearly shows that the judgment upon which appelle bases his cause of suit was as to appellant void.

III.

ASSIGNMENT OF CLAIM OF TRADING COMPANY TO SANBORN AND KENDALL

It is a conceded fact in this case that at the time the assets of the Packing Co. were transferred and assigned to the appellant, one of the considerations for such transfer was the assignment by the Trading Company to Sanborn and Kendall of the claim that the Trading Company had against the Packing Co. The appellant had agreed to satisfy and discharge all of the indebtedness of the Packing Co., excepting the claim of the Trading Company, and the evidence shows that appellant did this and paid, as we have stated, $81,177.18. This assignment was made by the President and General Manager of the Trading Company. That it was made for a valuable consideration cannot be seriously questioned. Mr. Kirberger's explanation of this assignment is found at pages 231 to 235, appellant's abstract of record: Interrogated by Mr. Robertson:

(Q) Now, Mr. Kirberger, there is an assertion in this assignment: "In consideration of one dollar to me in hand paid, the receipt of which is hereby acknowledged, and other valuable considerations, I hereby sell, assign," etc. Will you kindly tell the Court what other consideration you got for signing that assignment, if anything?

To this question, counsel for defendants objected upon the ground that the same was immaterial, irrelevant and incompetent.

THE COURT: Let him state the circumstances under which made and we will determine.

(A) It was made for the purpose of going east and raising the funds to assist in operating the cannery the next year, or in other words assisting to finance the Kake Packing Company, from the fact that Mr. Sanborn and Mr. Kendall had already advanced and put up a good deal of money into the proposition, and it was my idea to do all in my power to assist them in getting money to put in and operate again, and I didn't wish to see the cannery go bankrupt or go into the hands of a receiver.

(Q) Why did you assign your store account of $8582 to them?

(A) Because they gave me that instrument there, an option on their stock for the consideration of $65,000. If I was to raise $65,000, that would pay what Mr. Kendall and Mr. Sanborn had in the proposition and put the cannery on a good footing.

(Q) The original par value of the Kake Packing Company was $100.00.

(A) Yes, sir.

(Q) And on this date you signed this assignment, providing that upon the payment of $65,000, the defendants Kendall and Sanborn should assign and transfer to you, or to your order, 170 shares of the stock of the Kake Packing Company "now standing on the books of the company as follows:" Didn't you?

(A) Yes, sir.

(Q) In other words, under that assignment, you got an option to pay $65,000 for 170 shares of the stock of the Kake Packing Company. Is that true?

(A) That is true, as far as stated there, yes, sir.

(Q) Well, now why did you make the assignment of your store account, amounting to $8582.21?

(A) Because there was about ten thousand dollars of liabilities, outstanding, accounts, in addition to that, that the cannery owed the wholesalers and jobbers for lumber, etc., in addition, and they claimed that they would pay these bills, there themselves out of their pocket, if I would assign my store account; in order to enable me to go east and make that deal; to prevent others on the outside from interfering and jumping on the Kake Packing Company.

(Q) The defendants, Mr. Kendall and Mr. Sanborn, would pay the liabilities, certain liabilities of the Kake Packing Company, amounting to about ten thousand dollars?

(A) Yes, sir.

(Q) If you would assign to them—

(A) My store account.

(Q) The account of some eighty-five hundred dollars which the Kake Trading & Packing Company had against the Kake Packing Company?

(A) Yes, sir.

(Q) Did you receive any other consideration for making that assignment?

(A) None whatever, out side of I received a dollar on the account for the store. I received a dollar for that instrument and a dollar for the other one, I think.

(Q) You think they handed you a dollar a piece?

(A) Yes, they did.

(Q) Now, where did you say this was made?

(A) What date?

(Q) In whose office was it made?

(A) Mr. Sanborn's office.

(Q) In the presence of Mr. George W. Sanborn, Mr. Kendall and yourself?

(A) Yes, sir.

(Q) Anybody else present?

(A) Not to my knowledge.

(Q) Did you have an attorney present?

(A) No, sir.

(Q) Did you have advice of any attorney before signing the papers?

(A) No, sir.

MR. FULTON: Did Sanborn and Kendall?

(A) I couldn't say as to that, Mr. Fulton.

MR. FULTON: I don't thing anybody will contend that their lawyer drew that.

(Q) Now, do you mean, Mr. Kirberger, that an attempt—or that you were endeavoring to hold up the Canning Company by making this—by making these two assignments?

(A) Why I considered that it would be of great assistance to them as well as myself, and in making the deal east that I contemplated at the time.

(Q) Now, were you ever authorized in any way by the Kake Trading & Packing Company to make these assignments?

(A) No, sir.

MR. FULTON: I object to that as calling for his conclusions. What his authority was is a question of law.

THE COURT: That is perfectly clear; the records of the company will show whether he had any special authority, if that was necessary; and his position as general manager would determine whether he could do it as general manager.

On cross examination, Mr. Kirberger makes the following explanation concerning this assignment, to-wit:

(Q) Then you and Kendall and Gordon had a conference together?

(A) Yes, sir.

(Q) At the close of the 1913 season?

(A) Yes, sir.

(Q) Coming to the conclusion that the business was a failure?

(A) Yes, sir.

(Q) Sanborn personally—Sanborn & Son personally had advanced to the Kake Packing Company something like thirty-two or thirty-three thousand dollars of their own personal funds?

(A) Yes, sir.

(Q) Sanborn himself and Kendall had endorsed the commercial paper of the Kake Packing Company to the amount of something over $20,000?

(A) Yes, sir.

(Q) They stood then personally liable to pay something like—something over $50,000?

(A) Yes, sir.

(Q) How much more—how much above that fifty thousand do you think Messrs. Sanborn and Kendall had obliged themselves to pay personally, jointly?

(A) Personally—about ten thousand, nine hundred, something.

(Q) So that made Kendall and Sanborn obligated to pay for the Kake Packing Company something like sixty thousand odd dollars?

(A) Yes, sir.

(Q) Legally obligated to pay?

(A) Yes, sir.

(Q) You realized that?

(A) Yes, sir.

(Q) Then what solution did you offer for that situation? You were the man that had managed it.

(A) Why, Mr. Kendall at first had been talking to me in regard to the condition and when we met—Mr. Sanborn and Mr. Kendall and I met on January 5th or 6th, at Astoria, we had started to talk over the condition and affairs of the Kake Packing Company.

(Q) Could you tell us about what month that was?

(A) Yes, sir, January 5th, 1914.

(Q) That was the first time that Mr. Sanborn was able to get around to transact business?

(A) Yes, sir.

(Q) Now, go on and state what occurred then.

(A) And in this meeting, as you have stated it was quite a disappointment on the part of Mr. Sanborn, and also Mr. Kendall in regard to the profits made for the year, and I could realize that as well as they two, and I figured if there was anything I could do in the shape of getting some of these people interested that I had originally figured on getting interested with me; I would try to do so and it had to be put out in some kind of a proposition and that led me to send the first telegram, after getting an option for eighty-five thousand, on the entire hold-

ings. That telegram I sent to my brother, and he wired back that he didn't think it was possible at that time to do anything, and I immediately wired to an attorney, which is a man that is of considerable means and a man that I had already met in Alaska, a couple of years ago on a trip, and who afterwards I made a very pleasant relation, friendly relation, and this man had been contemplating and anxious to get into the canning business, too, and also my cousin, Mr. Fred Morck, who operates in the oil business, back in Warren, Pennyslvania, and I sent him a telegram also, and they replied and said they would have to have something more definite in the shape—better write everything—write the proposition out in detail; they wanted full particulars. So I went to Mr. Sanborn again, and Mr. Kendall, and they drew up that option then.

(Q) This option then, was drawn up at your request?

(A) I don't know as my request; I couldn't say as to that, but we talked it over and that was the idea of Mr. Kendall, who put it in that form.

(Q) I understood you to say that in putting the proposition to your friends and persons whom you thought would help you out, they

wanted the thing in more definite shape, and therefore, you went to Kendall and Sanborn and told them this, and that resulted in this contract here of January 6, 1914, Plaintiff's Exhibit "59."

(A) Yes, sir, I am familiar with that.

(Q) So you entered into this contract. Now, the idea—this contract is a little bit hazy, but the idea of that contract was and your understanding of it was, Sanborn and Kendall would take this $65,000 that you were to pay them and apply that upon the debts of the corporation—the Kake Packing Company, were they not?

(A) I don't know as I understand it just in that light. My understanding was that the $65,000 was to simply deliver their stock to me, or to the people that I got.

(Q) They were to put the $65,000 in their pockets?

(A) No, sir, it wouldn't be putting it in their pocket. It would be simply paying off the indebtedness, their own indebtedness; their own account there; it shows there on that statement.

(Q) That is—

(A) $20,000 bills payable and ten thousand American Can Company and thirty-two thousand to Mr. Sanborn.

(Q) That is right; they were to take the money, though?

(A) Yes, sir.

(Q) And pay it—apply it on claims due from the Packing Company?

(A) Yes, sir.

(Q) In other words, this $65,000 that was to be received from Sanborn and Kendall was to be applied upon the indebtedness of the Kake Packing Company?

(A) It certainly would be that fact.

(Q) And then they agreed not only to do that, but they agreed they would pay something like ten thousand dollars spot cash in addition to that, didn't they?

(A) Only if I surrendered my store account to them.

(Q) In case you suffered an equal loss with them?

(A) Yes, sir.

(Q) Then their proposition was that: If you bought from them, they would stand to lose the ten thousand—if you bought from them? That would be correct, wouldn't it? I don't want to—I am honest about this—as I understand it: If you bought from Sanborn and Kendall, paid them the $65,000, they would put ten thousand dollars on top of that, consequently they would

lose ten thousand dollars if you bought from them?

(A) The understanding was that they were to pay these bills. Yes.

(Q) And ten thousand more than $65,000?

(A) Yes, sir.

(Q) They would lose then their $17,000 they originally subscribed and the ten thousand on top of that. That is correct, is it?

(A) It is correct, sir.

(Q) And you, on the other hand, in case they bought from you, or in case you didn't buy, you were to lose your eighty-five hundred, because they were obligated to pay this $65,000 anyway?

(A) And my $12,500 besides.

(Q) Yes. If you didn't buy from them, they had to put up about seventy-five—$65,000; they would have to put up $65,000; in that event you were to waive your $8500?

(A) Yes, sir.

(Q) That was a fair deal, wasn't it?

(A) Yes, sir.

(Q) You considered that a square deal, wasn't?

(A) It was just as square—absolutely, it was all done in good faith, as far as I know.

(Q) I understand, and I don't want you to think, Mr. Kirberger, in my questions here that I am insinuating anything against you. I want to treat you just as I know how to treat anybody, and fairly too. But as I understand the contract, it was a mutual contract, it was a mutual contract between you; that no matter how it came out, no matter whether you bought or whether you didn't, one of you was bound to lose $10,000?

(A) May I make a statement?

(A) Sure.

(Q) You understand, Mr. Fulton, that when the $65,000 proposition was put up, this ten thousand nine hundred odd dollars there is in addition to Mr. Kendall and Mr. Sanborn's obligations to the company.

(Q) Yes.

(A) Now, this proposition, the way Mr. Sanborn put it up to me, and Mr. Kendall, that if I would make that assignment of the store account there, they would start in and pay these bills off, that was outstanding, outside the Kake Packing Company—the Kake Packing Company owing—to enable me to make this deal east, among my people, to prevent these other people, the creditors from jumping on the Kake Packing Company while I was absent.

(Q) Now, here is a letter that Mr. Sanborn wrote you on March 21, 1914, which somewhat clarifies and explains the situation, does it not?

(A) Yes, sir, I know the particulars of that letter.

(Q) And at the same time, you wrote another letter explaining the same situation?

(A) Yes, sir.

(Q) And that gives a pretty clear idea of what your understanding was then?

(A) Yes, sir, shows what I was trying to do.

(Q) You were doing your best I understand, to get out of a bad box. I don't recall that any of the stockholders got any money back, did they?

(A) No, sir.

Thereupon, counsel for defendants handed witness a letter.

(Q) That is your signature there?

(A) Yes, sir.

(Q) Now, who was Mr. Wallbridge?

(A) He was the attorney I was telling you about; an attorney in Hoopeston.

Thereupon, counsel for the defendants offered in evidence the documents just testified to, and the same were duly received and read in evidence, and

marked Defendants' Exhibit "E", and are hereunto attached and so marked, and made a part hereof.

(Q) This is a statement showing the assets and liabilities of the Kake Packing Company.

(A) That is correct to the best of my knowledge.

(Q) It shows assets to be $76,300.65; liabilities $72,621.01. Included in that are the Astoria Iron Works, American Can Company, $10,507.65; bills payable $20,359.84, etc. Now, I notice here, Mr. Kirberger, that you state that this $8500 transferred to Sanborn & Kendall from my own and the Kake Trading & Packing Company account was made with the distinct understanding that this transfer is a legitimate transfer to them of this full amount. What do you say as to that transfer now?

(A) I am not going back on that letter; I am not going back on that letter at this stage of the game, you can bet on that.

(Q) I didn't think you would.

(Q) When you wrote that letter you told the truth?

(A) I am not going to deviate from the truth in any form, shape or manner.

(Q) That isn't the question?

(A) No, sir.

(Q) When you wrote that letter, you told the truth?

(A) Yes, I told the truth.

(Q) The whole truth?

(A) Yes, and nothing but the truth.

(Q) Nothing but the truth, and that transfer of that $8500 was an absolutely honest, square, flat-footed deal between two men, as men, wasn't it?

(A) Yes, sir, there is no question in any form, shape or manner about the transfer, as far as any idea of fraud or anything like that.

(Q) You were two business men; met on open ground. You knew what you were doing, and you made, as far as you thought at that time a good business deal, didn't you?

(A) Yes, sir.

(Q) Now, the $5000 was not paid by you?

(A) No, sir, it was not.

(Q) But you got the extension of time, just the same, didn't you?

(A) Got the extension.

(Q) And you went back east, didn't you?

(A) Before, yes; before that was given I came back. Extended after I returned from the east.

(Q) You returned from the east in March?

(A) May—no, March, that is right.

(Q) So you had been east and had come back?

(A) Yes, sir.

(Q) And the result of your telegram was that the parties didn't desire to take it?

(A) Well, they didn't—they haven't never come out like that. The parties kept hanging fire, hanging fire, and hanging fire, and they were anxious to get in, but they couldn't get in contact with their own people that were in Florida or California and it was a very hard winter there, and they just hung back, and hung back, although they were very anxious to come in, but on account of the financial condition, etc., they didn't come through as we anticipated at the time.

(Q) You know that Mr. Sanborn and Mr. Kendall were practically the owners of the Sanborn-Cutting Company, didn't you all the time?

(A) Well, I didn't know it definitely, Mr. Fulton, that they controlled the Sanborn-Cutting Company, but I knew that Mr. Kendall talked to me and said they contemplated making a deal with the Sanborn-Cutting Company to take over, but I don't know any more than that.

(Q) Well, you understood that Mr. Sanborn was president and general manager of the Sanborn-Cutting Company?

(A) Yes, I knew that.

(Q) And that Mr. Kendall was also interested in it?

(A) Yes.

(Q) They made no attempt to conceal that from you?

(A) Absolutely none.

(Q) And so when you were dealing with the Sanborn-Cutting Company in making this sale of the assets of the Kake Packing Company to the Sanborn-Cutting Company, you understood the full relation of Mr. Sanborn and Mr. Kendall not only to the Kake Packing Company, but to the Sanborn-Cutting Company?

(A) Yes, sir, I appreciated that.

(Q) You understood that thoroughly and no attempt was made to deceive you in any way?

(A) No, sir.

(Q) You understood that. Do you think you could have made a better deal than you did with the Sanborn-Cutting Company if you had been given further time?

(Q) Do you think you could have made a better deal if you had had further time?

(A) I might have, if I had had the whole summer to it, but I don't know whether then, on account of the war breaking out August 6th there, might have affected us again.

(Q) Then, of course, it would have been necessary in any event for Kendall and Sanborn to have dug up about seventy thousand dollars in order to have given you that time, wouldn't it? In order that you should have enjoyed the whole summer in which to secure a purchaser?

(A) Well, I don't know that they would have had to expend that immediately. Of course, they were obligated to that extent there, as shown there on that statement.

(Q) The creditors naturally wanted their money?

(A) Yes, sir.

(Q) I presume the creditors of the Kake Packing Company were no different from ordinary creditors; they wanted their money, didn't they?

(A) Yes, sir.

(Q) And in order to have given you the summer, it would have been necessary for Sanborn and Kendall to have carried this seventy thousand odd dollar indebtedness?

(A) Yes, sir.

(Q) You couldn't do it?

(A) No, sir, I couldn't.

(Q) So on May 11th, before the meeting of the directors of the Kake Packing Company, May 11, 1914, you and Mr. Sanborn had discussed the situation pretty fully, hadn't you?

(A) Before May 11th.

(Q) Yes.

(A) Yes, sir.

(Q) You came to the conclusion that something had to be done?

(A) Yes, sir.

(Q) You had done your best, your level best, to get somebody to buy that?

(A) Yes, sir.

(Q) Well, in either event, Sanborn and Kendall would have lost ten thousand dollars or you?

(A) Yes, sir.

(Q) Each of you offered to sacrifice ten thousand dollars outside of the money you already had in, and you couldn't get a purchaser; that is right, isn't it?

(A) I can put it this way, Mr. Fulton: That I was willing to make any kind of a sacrifice in order to save the company from going into bankruptcy.

(Q) So were Sanborn and Kendall?

(A) Yes, and that is the reason I made this sacrifice.

(Q) You had a business reputation of your own to establish?

(A) Yes, sir.

(Q) So, when you met at the stockholders' meeting of May 11, 1914, you had practically made up your mind what you were going to do?

(A) Yes, sir.

(Q) What was your understanding about this 125 shares of stock that you signed over to Kendall and Sanborn? What was your idea about that? What was your understanding?

(A) It was simply that when I went east, I was obliged to make that assignment there and turn over the stock to Mr. Sanborn and Mr. Kendall in order to get that deal—get that proposition to go east with.

(Q) Oh, I see; you paid that for your option?

(A) Well, I can't say that I went out and put it that way; no, I wouldn't say it that way, either.

(Q) The Court here wants to know, and I want to know, too. We want to know what your idea is about it.

(A) Yes.

(Q) Now, you assigned Messrs. Sanborn and Kendall 125 shares of the capital stock of the Kake Packing Company?

(A) Yes, sir.

(Q) The assignment here says it is to be their property. Now, what was your idea about that; your contract is in; read it now. I may not understand it, but I would like to know what your views of this contract were.

(A) Well, the truth of the matter was, Mr. Fulton, so long as it was well enough to have that instrument, all right enough, but I trusted in Mr. Sanborn, and I trusted Mr. Kendall.

(Q) Yes, that was right, and they trusted you.

(A) And I never even went to an attorney for advice on that option.

(Q) No.

(A) Never had any interview with anybody else, any other business man, only Mr. Sanborn, Mr. Kendall, and myself.

(Q) Did they?

(A) I don't know, Mr. Fulton.

(Q) It was done in your presence there, wasn't it?

(A) Yes, sir. No, they didn't have at that minute.

(Q) Mr. Kendall you say wrote it?

(A) Yes, I think he did; wrote it in lead pencil, first.

(Q) Of course you have seen considerable of my writing; you know I didn't write that, don't you?

(A) I know you didn't write it.

(Q) No, sir, I dont think you did.

(Q) It isn't my words there at all, or my language?

(A) I understand you say I didn't have anything to do with it as far as you know.

(A) As far as I know, Mr. Fulton. You didn't have anything to do with that that I know of. Mr. Kendall wrote it out first, and I was anxious to make any kind of a sacrifice to keep the company from going under, and show that I wanted to do what I thought was right in their eyes.

(Q) That is right, but I wondered what you meant when you said that you didn't have the advice of an attorney.

(A) I didn't have the advice of an attorney whether that proposition—the option is legal or whether it wasn't legal. I didn't know that.

(Q) That is what you meant?

(A) Yes, sir.

(Q) I didn't understand; I thought that is what it was. It says here: "Should said Ernest Kirberger and A. C. Kirberger fail to perform and carry out the terms of this agreement as herein specified on or before February 15th, 1914, then all their right, title and interest in and to the stock of the Kake Packing Company, now standing in their names upon the books of the company shall cease, and same shall revert to and become the personal property of the said F. P. Kendall and George W. Sanborn." Now, isn't this the fact, Mr. Kirberger: That if you failed to make this business deal the entire burden of paying the indebtedness of the Kake Packing Company would fall upon the shoulders of Mr. Sanborn and Mr. Kendall. That is a fact, isn't it?

(A) Yes, sir.

(Q) And your object was and their object was that if they did pay it they wanted to own the stock?

* * * * *

(Q) And the understanding at that time was that the claim of the Kake Trading and Packing Company should not be paid by the Sanborn-Cutting Company, wasn't it?

(A) It never entered in on anything—never was brought up again, Mr. Fulton. Never since January 6th, never was mentioned again in regard to any matters at all.

(Q) But it was not included?

(A) No, sir, was not included in that.

(Q) And was purposely omitted, was it not, from that statement?

(A) Couldn't help but be omitted after it was signed over.

(Q) I say was purposely omitted?

(A) Yes, sir.

(Q) And your understanding was clear and flat-footed that the Sanborn-Cutting Company was not to pay the Kake Trading and Packing Company any part of that $8500, or anything it had against them?

(A) I never figured on anything that the Sanborn Cutting Company was to pay them; it never occurred to me at all.

(Q) Don't you know that was absolutely and thoroughly understood, that the Sanborn-Cutting Company was not to pay any sum of money whatever to the Kake Trading Company?

(A) It never was—it was never considered to pay anything that I know of.

(Q) I say, wasn't it understood that it was not? Wasn't that your understanding?

(A) It must have been my understanding according to the papers there; I can't go back on that.

(Q) I know, but wasn't it your understanding, Mr. Kirberger?

(A) Absolutely was my understanding as far as I know, that I couldn't come back after the account was assigned; I couldn't very well expect the Sanborn-Cutting Company to come back here and pay something that I had agreed to sign over.

(Q) I know, but suppose the assignment—I don't care about the technical proposition involved here, but am just talking about the proposition just man to man. The understanding was flat-footed and square-toed that the Sanborn-Cutting Company was not to pay the Kake Trading Company any part of this claim against the Kake Packing Company?

(Q) I know, but wasn't it your understanding, Mr. Kirberger, it was not to do so?

(A) The understanding was as far as I know, Mr. Fulton.

(Q) You were the only man that would know, outside of the Sanborn-Cutting Company, weren't you?

(A) Yes, sir.

(Q) Then what do you say about it, frankly, man to man?

(A) Why, I say just the same as I said there in the assignment; I assigned it over—or in the book there.

(Q) You never expected to get it back?

(Q) I say did you ever?

(A) I never did.

(Q) Never entered your head it was going to come back?

(A) I don't know whether there would be any consideration of the thing or not. In fact, I never figured anything else about it. After the thing was all over, I went up there and started to do the best I could.

(Q) And when these conveyances were executed, conveying the assets of the Kake Packing Company to the Sanborn-Cutting Company, you understood that the claim of the Kake Trading Company against the Kake Packing Company was not to be paid by the Sanborn-Cutting Company?

(A) Yes, I understood that.

(Q) You understood that?

(A) Yes, sir.

(Q) That is what I thought, and so did Messrs. Sanborn and Kendall understand it, and so did the Sanborn-Cutting Company through them—as you understand it; is that right?

(A) Yes, sir.

(Q) Now, there is a charge made here, Mr. Kirberger, in this complaint, that Kendall and Sanborn bulldozed you; that they made you sign a lot of documents down there against your will and against your consent. Is there truth in that at all?

MR. ROBERTSON: If the Court please, we think to call on Mr. Kirberger to answer the question in the direct form that way—it must be realized that while it is true Mr. Kirberger is here on our behalf, in a way that places the plaintiff to this suit to a disadvantage, because I have been compelled to bring Mr. Kirberger here; what Mr. Kirberger did at that time, as a matter of fact, is adverse to the plaintiff's interest at this time.

MR. FULTON: If counsel for plaintiff objects to the witness answering this question, I want it understood I will not have him answer it; if they object to having it in.

The testimony of Mr. Kirberger in the above regard was verified by the testimony of Mr. Geo. W. Sanborn, page 345, et seq., abstract. We do not deem it important to include Mr. Sanborn's testimony in this brief, for the simple reason that the testimony of Mr. Kirberger shows, beyond any question, that the assignment by him of the $8582.21 account was for a valuable consideration, and was made in the utmost good faith by all parties concerned. Mr. Kirberger, as manager of the Trading Company, was of the honest opinion that by such assignment, the Trading Company would obtain a financial benefit and commercial advantage. This is, undoubtedly, a sufficient consideration for the transfer.

The evidence further shows that the transfer was based upon an actual consideration and a reasonable and fair consideration. The Wallbridge letter, above mentioned, Defendant's Exhibit "B", will undoubtedly, throw some light on the subject, and we incorporate it herein, to-wit:

"(Marked) Copy to Geo. W. Sanborn and Son.

March 21st, 1914.

Mr. John B. Wallbridge,
Hoopeston,
Illinois.

My Dear Mr. Wallbridge:

I arrived in Portland on Saturday night, the 14th, and have had a conference

with Kendall and Sanborn on Monday and Tuesday of this week, and since then have been in Astoria going over the books and statements and trying to get out a more comprehensive statement of assets and liabilities of the Kake Packing Co., as you seemed to not quite understand the proposition as put up to you.

In the first place, the item of about $8,500 transferred to Sanborn and Kendall from my own and the Kake Trading and Packing Co., account, was made with the distinct understanding that this transfer **is a legitimate transfer to them of this full account, and this amount does not appear in the liabilities of the Kake Packing Company as it is not a liability now, having been charged off the books.** The consideration being that they gave me an option on the Kake Packing Company, while I could make my trip east, and also if I succeeded in making the deal, they were to deduct in assuming the liabilities, $10,000. In other words, if we took the plant there was to be $10,000 deducted from the total liabilities, which they were to assume and pay out of their own pockets; and which both they and I propose to stand by. To make it more clear to you I am enclosing you herewith statement of the assets and liabilities of the company. We have had to make a new

one, as quite a lot of the pickled and canned salmon has been sold and credited to this account since my leaving here. This leaves cashable assets of $15,656.37. Of this there is 79 tierces of pickled salmon which will probably be sold shortly and go to the credit of the account. There is also 437 cases of canned salmon that will be sold; in fact, are sold now and waiting for shipment. The balance of the cashable assets are in Alaska and are just as good as cash, as if we operate they will all have to be used, and would have to be bought and paid for if we did not have them. The other assets, buildings, machinery, etc., are identical with the statement you have, with the exception that I find I left out really a cash item, which was Fire insurance, $927.25. This is the amount paid for insurance in force, and which carries through a good part of the year and should be the same as any other asset. The item that I had in my old statement of $5,-937, insurance on Launch Kake, has been received and has gone to pay off part of the liabilities. You will notice that the liabilities have been decreased considerably, as Sanborn and Kendall have paid off quite a few of these accounts. You will also notice that the total liabilities amount to $72,621.-01. Sanborn and Kendall are willing to assume and pay for all of these liabilities;

we to pay them $62,621.01, or a deduction of $10,000. They are also willing, and agree, under letter today, to me, to give me further extension in order to make this deal, up to May 1st, providing I pay in to them $5,000.00 between now and March 28th, said $5,000, to apply on the purchase price of the plant. They agree to turn over to me all the stock of the corporation in their hands; That is, the Kendall stock, the Sanborn stock, the Gordon stock, the Fulton stock, and my stock, which I transferred to them, in fact all the stock with the exception of my Brother's.

Now I wish to impress upon your mind that if you wish to make the deal—and and I hope you do—that the $5,000.00 must positively be paid immediately, otherwise there is no extension and they will have to take the plant, as time is getting late for operating, and if anything is to be done, either by ourselves or themselves, the matter must positively be settled at this time and papers exchanged not later than May 1st. Otherwise we would lose the season's business. In making this agreement with them I have positively taken it upon myself to turn over to them my Brother's stock of $6,000, in addition to my own stock which I transferred before leaving here for the East, providing we do not take the plant.

If the $5,000.00 is paid as above they agree to deposit in escrow in any one of the banks all the Kake Packing Co. stock as above to be turned over to us on payment of the balance of the $62,621.01.

I desire to state that the outlook for the coming season in canned salmon and mild cured salmon is very good and a great deal better than when I was East. The Burnett Inlet Plant in which Mr. Sanborn is interested is going to operate and is preparing for 60,000 cases, salmon, and 500 tierces pickled salmon.

This is a mighty good proposition and I consider that we have a first class deal and I hope that you will do everything in your power to co-operate with Mr. Morck to pull this deal through. You will understand that I am willing to put all my holdings, store property and stock of merchandise in the new organization and take stock for same. I am sending a copy of this letter to Mr. Morck also statement so that you will both keep posted at the same time.

Upon receipt of this I wish you would wire me whether the proposition is accepted and the five thousand arranged for immediately.

Very truly yours,

(Signed) Ernest Kirberger."

We wish to call the Court's attention to the following in the above letter, namely:

> "In the first place, the item of about $8,500 transferred to Sanborn and Kendall from my own and the Kake Trading and Packing Company, account, was made with the distinct understanding that this transfer is a legitimate transfer to them of this full account, and this amount does not appear in the liabilities of the Kake Packing Company, as it is not a liability now, having been charged off the books."

This ought to settle all controversy as to what the assignment to Sanborn and Kendall included. It included the entire claim sued upon and upon which judgment was entered in the Alaska case, wherein the appellee was plaintiff, and the Kake Packing Co. was defendant, being the judgment upon which the appellee based his cause of suit.

It will be further observed, in the statement of the liabilities of the Kake Packing Co. made to Sanborn-Cutting Co., appellant, the claim of the Trading Company is conspicuous by its absence. Thus, by written assignment duly executed and delivered, by letter, and by statement of the liabilities of the Kake Packing Co., the claim of the Trading Company is shown to have been owned by Sanborn and Kendall, and not only that, the agreement was that no claim would be made against the purchaser of the assets of the Packing Co. by the Trading Company on such account.

We think, therefore, that we are clearly within the record when we state that the following propositions are clearly established by the evidence without any contradiction whatever, namely:

FIRST: That the assignment by the Trading Company to Sanborn and Kendall of the $8582.21 claim of such company was had for a good and valuable and reasonable consideration, and was intended to include the entire claim of the Trading Company.

SECOND: That Kirberger, as President and General Manager of the Trading Company, and as owner of all of the stock thereof, and who had for years transacted all of the business of the Trading Company, had full power and authority to make this assignment. Sun Printing Assn. vs. Moore, 183 U. S. 642.

THIRD: That the assignment was made and accepted in absolute good faith, and was part of the consideration for the moving to the appellant of the assignment to it of the assets of the Packing Co. In other words, appellant would not have accepted the assignments of the assets, unless this claim had been transferred and cancelled, for it was well understood that this claim was not to be paid by the appellant. Swain v. Seaman 9 Wall. 274.

FOURTH: That even though it should be held that Kirberger did not have power or authority to assign the claim of the Trading Company, amounting to $8582.21 to Sanborn and Kendall, yet the evidence clearly shows beyond any question that the Trading

Company consented to the assignment of the assets of the Packing Co. and consented that such assignment should be made without payment of its claim, and waived any equity or right that it had to enforce its claim against the Packing Co., or the appellant, and that, as a matter of law and equity, the Trading Company is estopped from enforcing its claim either in law or in equity against the appellant, or against the assets of the Packing Co.

These propositions seem to us to be so clearly established by the evidence as to require practically no further argument.

IV.

VALIDITY OF ASSIGNMENT OF THE CLAIM OF THE TRADING COMPANY TO SANBORN AND KENDALL

The Court below in its opinion held—

FIRST: That the evidence shows clearly that there was no actual fraud or moral turpitude in the transactions involved in the suit, and that all parties, including Kirberger, acted in the utmost good faith, with no intent to wrong **anyone,** and that the only question involved in the case was the legal effect of what they did.

SECOND: The Court then held that the assignment of January 6, 1914, not having been authorized by the Board of Directors, and without consideration, was, therefore, void as a matter of law as to the

Trustee in Bankruptcy, although he represented only creditors who had become such after the date of the assignment.

THIRD: That although the property of a private corporation in not chargeable with any specific lien in favor of the general creditors, so long as it is in the active exercise of its functions, if not restrained by charter or statute, it may exercise full dominion over its property as an individual over his. When, however, it becomes insolvent and does not expect to make any further effort to accomplish the object of its creation, it becomes the duty of its officers and managers to distribute its property or proceeds thereof ratably among all the creditors, having regard, of course, to valid liens or charges previously placed upon it. That the law will not permit them under such circumstances to obtain any advantage for themselves to the prejudice of other creditors.

FOURTH: The Court further held that because of the fact that the Packing Co. was insolvent and intended to cease business, and that because of the fact that Sanborn and Kendall were stockholders and directors in both the selling and purchasing companies, the Packing Co. could not within the law transfer the property of the Packing Co. to the appellant, upon the latter paying a part only of the indebtedness of the Company, especially since such indebtedness was largely due to them personally, or for which they were liable as endorsers or guarantors.

We respectfully submit that the lower Court overlooked entirely the true principles involved in the transaction complained of, and failed to appreciate the full force of its evidence, in the following particulars:

FIRST: The testimony and evidence, as we have stated, shows clearly that the assignment to Sanborn and Kendall of the claim of the Trading Company against the Packing Co. was made for a valuable consideration. This we have demonstrated from the testimony of Kirberger alone.

SECOND: The Court was clearly in error in holding that Kirberger, as President and General Manager of the Trading Company and owning all of its stock, could not make a valid transfer or assignment of its accounts against the Packing Co., unless such assignment was authorized by the Board of Directors. This doctrine is wholly at variance with the rule laid down by this Court in Pacific State Bank v. Coats, 205 Fed. 618-621. Sun Printing Assn. v. Moore, supra. This Court, in discussing the powers of a Washing ton corporation, the Trading Company being a Washington corporation, among other things quotes with approval the case of Parker v. Hill, 68 Wash. 134, 146; 122 Pac. 618-623, as follows:

> "People dealing with corporate agencies have the right to rely upon the apparent authority of those in charge of the corporate business, and for acts done within the scope of that authority the corporation is bound."

The doctrine, however, of the power of an officer of a corporation owning all the stock is there clearly defined, as follows:

> "In the case at bar we have the president and secretary, who are not only the sole trustees of the corporation, but its sole stockholders, receiving money to the use and benefit of the corporation, and executing a mortgage on the company's property to secure the payment thereof; and they attach the corporate seal. To what other source could one look for corporate power to do the thing that was done? And then we have the apparent authority and the ratification. Can it be that this instrument is void, and will be so declared by a court of justice, because these two stockholders, officers, and trustees did not convene in board meeting, and solemnly declare and resolve that they, as officers, be authorized to execute the instrument given to secure moneys that such officers received to the use and benefit of the corporation? It could hardly seem so. In such a case the act of meeting together and authorizing themselves to do the thing we call executing the mortgage becomes a mere formality which the law does well to disregard, and the mortgage ought not to, and will not be, held to a nullity because of the omission of the formality."

It is manifest that it would have been absurd to have had Kirberger solemnly call a meeting of the stockholders or directors of the Trading Company in which he owned all the shares, and then solemnly pass a resolution authorizing the sale of this account. Nothing could have been more absurd. The rule is otherwise in all jurisdictions that we have been able to discover that have had occasions to pass upon this proposition.

In McElroy v. Minnesota Percheron Horse Co., 96 Wis. 377; 71 N. W. 652, the Court, through Marshall, Justice, says:

> "George W. Paine was substantially the corporation. He owned all the stock, except six shares obviously kept in the names of others to render them eligible to hold offices. No one but Paine appears to have had any substantial pecuniary interest in the organization. The board of directors was made up of himself, his son Nathan Paine, who lived with him, his son-in-law Charles Nevitt, a resident of the same place, T. M. Brown, an employe on the Minnesota farm, and H. M. Bogart, a relative living in Minneapolis. The corporation affairs, for about five years, had been conducted by George M. Paine and by his predecessor in office without any objections or proceedings whatever by stockholders or directors, so far as appears from the records. No elec-

tion of officers by stockholders was had during that time, and no meeting whatever held, except one a few months before making the contract, at which the only business transacted was to fill the places of several directors who had resigned, which was done by election by those who remained. For two years and more negotiations had been going on for a sale of the property through plaintiff's Chicago agency, all conducted by Paine or his predecessor, as substantially the only persons interested. The whole course of the corporation had been such as to lead the public, and particularly plaintiffs, to regard the president of the corporation as having full power to act in its behalf as its general agent, and to do all that such an agent might properly be authorized to do. Such was the apparent scope of the powers of George M. Paine at the time of the making of the contract in question. To such a state of facts the doctrine of estoppel, upon which all the aforesaid rules are founded, applies to protect the plaintiffs from the injustice of allowing the corporation to repudiate the act of its president, with whom they dealt upon the faith of appearances, for which the corporation was responsible."

In that case, the President of the corporation, without any authority from the Board of Directors or stockholders, entered into a contract for the sale of practically the entire assets of the corporation, agreeing to pay the agent who affected the transfer the sum of $3750.00. The corporation defended upon the ground that the President had no authority for the sale of real estate, being practically the assets of the corporation, without authority from the Board of Directors. The facts in the above case apply with great force to the case at bar. Kirberger had at all times, without any reference to the stockholders or directors, transacted all the business of the corporation, and had done so for many years prior to the transaction complained of. He owned all the stock of the corporation Trading Company, and, as stated by this Court, in Pacific State Bank v. Coats, supra., and to use the language employed by this Court in that case, "can it be that this instrument is void, and will be so declared by a court of justice, because these two stockholders, officers and trustees did not convene in board meeting, and solemnly declare and resolve that they, as officers, be authorized to execute the instrument given to secure moneys that such officers received to the use and benefit of the corporation? It could hardly seem so."

In Arkansas Pass Harbor Co. v. Manning, 63 S. W. 627; 94 Tex. 58, the Supreme Court of Texas, through Chief Justice Gaines, in discussing the law in this regard, says:

"That the President has made the deed and the question is, did he have authority to do so. It not appearing that there were any creditors whose interests could be affected, could the consent of all the directors and all the stockholders to the conveyance give authority to make it, there being no 'corporate action,' that is to say, no action by the directors as a board? Notwithstanding the authorities which seem to hold to the contrary, we are of opinion that the sounder doctrine is that it could. A stockholder, merely as such, has no direct agency in the control of the business of the corporation. He has no direct interest in its property. His right to such property is collateral. But, in its last analysis, the stockholders are the beneficial owners of the assets of the corporation. This proceeding is instituted upon the theory—which we think a correct one—that the shareholders are the ultimate owners of the corporate property, and, when the corporation is dissolved, and its creditors are satisfied, they hold title to the assets in proportion to their respective shares. The directors must ordinarily make disposition of the corporate property, because its creditors have rights which it is their duty to protect. A majority of the stockholders, even all save one, cannot authorize a sale of the cor-

> porate assets, for the reason that every stockholder has the right to require the action of the legally constituted agency—the board of directors—in the management of its business. But when all assent, there being no creditors to complain, they should not be permitted to complain. When every one who has an interest in the property, although that interest may, as long as the corporation exists, be direct, consents that the officer appointed by the law to convey the assets of the corporation, when duly authorized so to do, shall convey, and it is accordingly so conveyed, we are of the opinion that the conveyance should be held good."

We have cited this case for the sole and only purpose of making clear the proposition that Kirberger being the owner of all of the stock in the Trading Company had the power to make the transfer of its claim against the Packing Co., without a formal order of the Board of Directors.

The rights of the creditors of the Trading Company is one proposition, and the power and authority of Kirberger, its President, to make the transfer in question is another proposition. In other words, the assignment so made is of equal validity as if it had been duly authorized by a formal meeting of the stockholders and by a formal meeting of the directors. This proposition the Court below failed

to appreciate. It was, therefore, not void under such aspect of the case.

The rule above announced is supported by the Supreme Court of the United States, namely:

> Union Pac. R. Co. v. Chicago, M. & St. P. R. Co., 163 U. S. 564; 16 Sup. Crt. Rep. 1173; 41 L. ed. 265.

It also finds support in the following:

> Sun Printing Assn. v. Moore, supra.
>
> Jordan v. Collins, 107 Ala. 572; 18 So. 137.
>
> Moore & Handley Hardware Co. v. Towers Hardware Co., 87 Ala. 206; 6 So. 41.
>
> Swift v. Smith, 65 Md. 428; 5 Atl. 534.

and is the rule announced by Professor Thompson on Corporation, Vol. 7, Section 8043.

Such being the law of this case, the question to be determined by this Court is, was the assignment of the Trading Company's claim to Sanborn and Kendall fraudulent, either as to the Trading Company, or to its creditors? Neither Sanborn nor Kendall had any interest in the Trading Company. They were neither stockholders, officers nor agents. They were dealing with an apparently solvent corporation. The same can be said of the appellant. Neither it, nor its officers or agents, had any interest whatever in the Trading Company. It was dealing with an apparently solvent corporation, and a corporation that thereafter continued in business for practically

one year. It was a transaction that the officers of the Trading Company believed to be advantageous to such corporation. It was a fair and honest transaction; it was made for a good consideration, and a consideration which the President, General Manager and owner of all of the stock of the Trading Company believed to be a valuable consideration at the time the transfer was made. A corporation the same as an individual when it is a going concern may prefer one creditor to another.

A creditor of an insolvent corporation can, undoubtedly, consent to the transfer of the assets of a corporation to a third party, and agree to waive its claim against the purchaser, and if such creditor assists in making the transfer and agrees with the purchaser not to enforce its claim against it, such creditor is thereafter estopped from claiming that the transfer of the assets of the insolvent corporation is void to him. Swain v. Seaman, 9 Wall. 274.

V.

ESTOPPEL.

We respectfully insist that the transfer of the assets of the Packing Co. to Sanborn-Cutting Co. having been made in the utmost good faith and for a valuable consideration, and that such transfer was made at the request of the Trading Company, and pursuant to an agreement on its part with the appellant that it would not enforce its claim against the

appellant, should the appellant purchase the assets of the Packing Co. and pay all of its bills, excepting its claims, that the Trading Company and its creditors are estopped from enforcing such claim against the appellant. This is unquestionably the rule in all jurisdictions that our attention has been called to. The assignment of the entire assets of a corporation is void only as to creditors not consenting thereto. A creditor has the right to state to an intending purchaser of the assets of an insolvent corporation that if such purchaser consummates the purchase that he will not insist upon his claim being paid by such purchaser. This porposition the Court below entirely overlooked. The facts in this case are, that Kirberger, the President, General Manager and owner of all the stock in the Trading Company, gave the most solemn assurances to the appellant that the Trading Company would waive payment of its claim from the assets of the Packing Co. transferred to the appellant, and in furtherance of that assurance, the Trading Company assigned to Kendall and Sanborn the entire claim of the Trading Company. After such assurances had been made and the assignment delivered, appellant purchased the assets of the corporation. We submit that nothing could be fairer than to hold that under such circumstances neither the Trading Company, nor its officers, could enforce their claim against the appellant, and it would be travesty upon justice to hold that the appellant under those circumstances, after fully complying with all the terms of its contract, should be held in the further sum of $6688.87.

As we have stated, the Trading Company was entirely solvent. The transaction complained of was completed one year before the Trading Company was declared a bankrupt, and whilst it was a going concern, and it was the honest belief of the owner of the Trading Company that the continued operation of the salmon cannery of the Packing Co. would be of more benefit to the Trading Company than if the sale should not be consummated and the plant thrown into bankruptcy and perhaps never operated. These were the considerations that moved the Trading Company to make the concessions it did.

According to the rule laid down in 7 Thompson on Corporations, Section 8043, the agreement on the part of the President and General Manager of the Trading Company to waive its claim against the appellant and the assignment of such claim to Sanborn and Kendall was known and consented to by all of the stockholders of the corporation, each was consulted, and each consented, and all of the stockholders of the corporation executed the assignment, namely, Ernest Kirberger.

It is true, it was signed by but one director; but, as we have stated, the other two directors were mere creatures of Kirberger and held the stock for his sole use and benefit. It was not the intention of the Trading Company to give anything to the Sanborn-Cutting Co., and it was not the intention of the Trading Company to make a pure gift to Sanborn-Cutting Co. The assignment of the claim in question was

made upon the honest belief that it was a good business transaction, one that would inure to the benefit of the Trading Company. The fact that it turned out otherwise could not effect the equitable rights in the appellant.

There is no evidence in the record of any existence of any creditor at the date of the assignment. The evidence in the record does not show, as we understand it, that the Trading Company was in anywise indebted at the date of the assignment. As we read the record, there is nothing therein showing or tending to show, at the time this assignment was made, that there was then existing any of the present creditors of the Trading Company. As far as from this record appears, every creditor of it has become such after the assignment in question. This being true, they surely could not complain of the transaction in question.

VI

WAIVER

> We do not question the doctrine, that where one corporation transfers all of its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, and that it is not necessary that

> a fraudulent intent or want of consideration be disclosed. The property is a fund that the law sets apart or charges with a lien in favor of the creditor. That a debtor corporation cannot dispose of its entire assets to the prejudice of its creditors, and that such grantee must take notice that it takes the assets subject to the lien of the creditors. And that when a corporation not in the ordinary course of business transfers its assets to another corporation, the very circumstances of the case imply full knowledge on the part of the transferee of all the facts necessary to charge the property in its hands with the debts of the selling corporation.

This is the rule in Oregon as laid down by Mr. Justice Eakin, in Williams v. Commercial National Bank, 49 Or. 492, 498, et seq.; 11 L. R. A., N. S., 857, 860.

Therefore, it matters not, if the officers of the selling corporation be officers of the purchasing corporation. In this case, it is immaterial that Sanborn and Kendall were officers and owned stock in the appellant, and were officers of and owned stock in the Packing Co. The principle so far as this case is concerned is the same, as if the sale had been made to a corporation in which neither had any interest. The appellant knew the financial condition of the Packing Company, and as the consideration for the transfer, agreed to pay its corporate debts,

excepting the debt of the Trading Company which had been assigned to Sanborn and Kendall, and the payment of which claim had been expressly waived by both the Trading Company and Sanborn and Kendall. We do claim, however, that the lien of such creditor can be waived, and such creditor by its acts can be estopped from enforcing such lien.

And we earnestly insist that the evidence in this case clearly, and without any contradiction, shows the Trading Company and Sanborn and Kendall both waived payment by appellant of the claim in question, and by their acts became and were estopped from enforcing such claim and lien.

It was expressly agreed by the President and General Manager of the Trading Company that its claim against the Packing Co. should and would be waived, and the right of such corporation to participate in the assets of such Packing Co. waived, and in order to protect appellant in that regard, the claim was assigned to Sanborn and Kendall. Surely Kirberger had the right to enforce payment of such claim by suit or action, by attachment or otherwise. He had the right to release attachment. He had the right to compromise the claim. He had the power to waive the lien of the Trading Company upon the assets so transferred.

Therefore, it makes little difference in this case, whether he had the power to assign this claim. He surely had the power to waive the claim of lien imposed by law. That he did just this thing is clearly

proved, and cannot be seriously denied. It is conceded that upon the strength of this waiver, the appellant advanced and paid the debts of the Packing Co., aggregating $81,177.18, and that it would not have done so, unless this lien had been waived. It is unquestioned that the Trading Company honestly believed that in waiving such claim, the best interests of such corporation would be subserved. It cannot be seriously contended that such waiver was not for a valuable consideration.

It cannot be questioned that by its actions, it induced appellant to part with a large sum of money it otherwise would not have parted with, and caused it to prejudice itself in many ways it would not otherwise have done.

It cannot be questioned but that it was the clearly expressed and well understood proposition by all parties concerned that such lien would be and in fact was so waived.

This is easily demonstrated from the evidence. The evidence shows that the stock in the Packing Co. subscribed by Kirberger was subscribed for the use and benefit of the Trading Co. and paid for by it. The Trading Co. purposely permitted Kirberger to vote such stock. Kirberger was, therefore, the trustee and agent of the Trading Company in the voting of such stock, and in his actions as an officer of the Packing Co. Kirberger urged appellant to make the purchase in question; assured appellant that the Trading Company would and did expressly

waive payment of its claim against the Packing Co. and agreed that if appellant should pay all the other indebtedness of the Packing Co., the Trading Company would waive its claim. Kirberger purposely and knowingly left out of the liabilities of the Trading Company the claim of the Packing Co. All these matters were fully, frankly and freely discussed, and appellant relying upon such waiver and representations was induced to part with its money. Such are the facts and such is the evidence in this case.

This being true, the lower Court erred in holding the transfer of the assets of the Packing Co. to appellant void as to the Trading Company, and such assets were a trust fund for such Trading Company, to the extent of ratably paying its claim.

The authorities upon the doctrine of the law of waiver are clearly stated in Volume 4, Words and Phrases, second series, and also in Volume 8, Words & Phrases Judicially Defined, pg. 3775, and in 40 Cyc 252, that a citation of these excellent works it seems is all that is necessary in order to refresh the Court's memory as to the doctrine of waiver.

In Prichard v. Mulhall, 118 N. W. 43, 45; 140 Iowa 1, Justice Deemer, speaking for the Court says:

> "It is contended for appellant that it is essential to such a waiver as relied upon by plaintiff that it be supported by consideration. This is not true as a matter of fact. A waiver is an intentional relinquishment of a known right, and consideration is not necessary in all cases."

In Currie v. Continental Casualty Co., 126 N. W. 164, 165; 147 Iowa 281, the rule is announced:

> "A waiver is the intentional relinquishment of a known right, and any conduct relied on which warrants the belief that such relinquishments has been made constitutes in law a waiver."

In Swedish-American Bank of Minneapolis v. Koebernick, 117 N. W. 1020, 1023; 136 Wis. 473, the Supreme Court of Wisconsin says:

> "A waiver is the intentional relinquishment of a known right, which may be shown by a course of conduct signifying a purpose not to stand on a right, and permitting the inference that the right in question will not be insisted on, and where the facts and circumstance relating to the subject are admitted, or clearly established, waiver becomes a question of law."

In Alexander v. North Carolina Savings Bank & Trust Co., 71 S. E. 69, 70; 155 N. C. 124, it is said:

> "A waiver is an intentional relinquishment of a known right, which may be manifested by word or mouth, or by such acts and conduct as would naturally give rise to an inference that a waiver is intended; and there is no waiver unless the intention to waive is understood by the party to be benefited, or where one party has misled the

other, or unless the act relied on ought in equity estop the party from denying it."

In List & Son v. Chase, 88 N. E. 120, 122; 80 Ohio St. 42, it is said:

> "A waiver is the voluntary relinquishment of a known right. It may be made by express words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform."

In Connecticut Casualty Co. v. Bridges (Texas) 114 S. W. 170, 171, it is stated:

> "A waiver may be inferred from any circumstances which show both parties understood that payment of the premium would not be required at a specified date."

In First National Bank of Brooklyn v. Gridley, 98, N. Y. Supp. 445, 451, it is stated:

> "A waiver is nothing more than the relinquishment of some right, which, being personal, requires no consideration for its support, it does not necessarily rest on the doctrine of estoppel, but results from an agreement between the parties express or implied."

In Kennedy v. Manry, 6 Ga. App. 816; 66 S. E. 29, 31, it is said:

"Waiver and estoppel are not synonymous, for, while they have attributes in common, there are still marked differences; waiver being voluntary and intentional, while estoppel in pais may arise from an involuntary and unintentional act, or may result from an act which operates to the injury of another, while there may be a waiver while the opposite party is beneficially affected. Estoppel may arise between consistent remedies, but it depends rather upon what a party caused his adversary to do; while waiver depends on what one himself intended to do."

In Johnson v. Spencer, 49 Ind. App. 166; 99 N. E. 1041, it is said:

"A waiver is a voluntary and intentional relinquishment of a known right, and may be shown by the express contract or other affirmative act of the party charged therewith, or it may be inferred from such conduct as warrants the conclusion that a waiver was intended. The term 'waiver' generally implies an intention on the part of the person possessing some right under the contract or the law to relinquish it for the benefit of another. It is ordinarily personal, and, in the absence of some special agreement of consideration, its existence is to be determined solely from the conduct of the parties making it, independent of the

> acts of the other party affected. It is distinguished from estoppel in that this personal element is not an essential of estoppel. Nor in estoppel is the intention to relinquish a right necessarily present."

In Loftis v. Pacific Mutual Life Ins. Co., 38 Utah 532; 114 Pac. 134, 139, it is said:

> "A waiver operates as an estoppel on the party who waives; but it is not essential to a waiver that a party in whose favor it is made must prove all the elements of an estoppel in pais before he is entitled to avail himself of the waiver."

40 Cyc 252, et seq.

The evidence in this case shows clearly that it was the intention of the Trading Company to, and it did both by words and acts, relinquish its claim against the assets of the Packing Co. That it entered into an agreement with the appellant that if the appellant would purchase the assets, it would not enforce its claim either against appellant, or the assets of the Packing Co., and based upon this express stipulation and the acts of the Trading Company, the appellant purchased the assets of the Packing Co. and paid therefor the sum of $81,177.18, which it otherwise would not have done had it not been for the stipulations agreements and acts of the Trading Company. Not only that, the Trading Company urged the appellant to make the purchase. Therefore, viewed from any standpoint, the agree-

ments on the part of the Trading Company and its acts amounted to both a waiver of its right to a lien upon the assets of the Packing Co., and also worked an estoppel upon it to enforce such claim.

The testimony of Mr. Kirberger covering this proposition is clear and explicit, pg. 319, appellant's abstract. Referring to this transaction, Mr. Kirberger was asked the following questions:

(Q) And the understanding at that time was that the claim of the Kake Trading and Packing Company should not be paid by the Sanborn-Cutting Company, wasn't it?

(A) It never entered in on anything—never was brought up again, Mr. Fulton. Never since January 6th, never was mentioned again in regard to any matters at all.

(Q) But it was not included?

(A) No, sir, was not included in that.

(Q) And was purposely omitted, was it not, from that statement?

(A) Couldn't help but be omitted after it was signed over.

(Q) I say was purposely omitted?

(A) Yes, sir.

* * * * *

(Q) I know, but wasn't it your understanding, Mr. Kirberger?

(A) Absolutely was my understanding as far as I know, that I couldn't come back

after the account was assigned; I couldn't very well expect the Sanborn-Cutting Company to come back here and pay something that I had agreed to sign over.

* * * * *

(Q) And when these conveyances were executed, conveying the assets of the Kake Packing Company to the Sanborn-Cutting Company, you understood that the claim of the Kake Trading Company against the Kake Packing Company was not to be paid by the Sanborn-Cutting Company?

(A) Yes, I understood that.

(Q) You understood that?

(A) Yes, sir.

(Q) That is what I thought, and so did Messrs. Sanborn and Kendall understand it, and so did the Sanborn-Cutting Company through them—as you understand it, is that right?

(A) Yes, sir.

Nothing could be plainer; nothing could be clearer. The President, the General Manager and owner of all the stock of the Trading Company, and the man who had transacted all of the buisness of such corporation from the time that he owned all of the stock, which was several years prior to the transactions spoken of here, purposely, deliberately, knowingly and intentionally relinquished the right

of the Trading Company to enforce its lien upon the assets of the Packing Co., and words and acts positively informed the appellant that it would take over the assets, free and clear of all and any claim, equitable or otherwise, of the Trading Company. Such being the facts, the Court below was surely in error in finding to the contrary.

Occupying such position, that Kirberger had power and authority to make this waiver cannot be seriously questioned. It will surely not be contended that before an officer possessing such power and authority could make this waiver, it would be necessary to call a special meeting of the stockholders and trustees of the corporation to give him such authority.

VII.

WAS THE TRADING COMPANY INSOLVENT AT DATE OF ASSIGNMENT OF ITS CLAIM TO SANBORN AND KENDALL? OR DID SUCH ASSIGNMENT RENDER IT INSOLVENT?

The evidence of the value of the assets of the Trading Company, at the date of the transfer by it of its claim against the Packing Co., is, to say the least, most remarkable. The books kept by the Trading Company show clearly that it was entirely solvent. We call the Court's attention to page 287, et seq.,

appellant's abstract. It is there shown that the value of the assets of the corporation, as shown on the books of such corporation, at this date, was $23,-849.54, exclusive of its claim against the Packing Co., and that its liabilities were $19,612.18, leaving the assets $4237.36 in excess of its liabilities.

It is true Kirberger said, that "The Point Barrie" property listed on the books at $5000.00 had no **real** value. Its value is not stated. It is a matter of common knowledge that in the opinion of many, certain property commanding a large price, and finding ready sale, has no real value. This is largely true of town lots, and other property that readily suggests itself. Taking the entire assets of the Trading Co. at that date, if we include the claim against the Packing Co. in the amount, the claim against the Packing Co. in the amount claimed by the appellee aggregated $34,182.85, and its liabilities only $19,612.18. But figure it any way according to the books kept by Kirberger, which he offered in evidence and swore were correct in every particular, both before and after the transfer of its claim against the Packing Co., it was entirely solvent.

We submit that the evidence offered on behalf of appellee as to the value of the assets of the Trading Company should be viewed with cold suspicion. The property is located in Alaska, accessible only by boats. Few people are qualified to testify as to its value living in the states, if any, and then known only to appellee and Kirberger. Appellee called, outside of Kirberger, but one witness as to the value of such

assets. His evidence was not confined to the date of the transfer of the claim in question, but certain "appraisements" made long thereafter, and without any showing as to whether the same property owned by it at such time. Mr. Jaeger was called as a witness, presumably at least to testify to the value of such assets. His testimony is found on pages 339 to 344, both inclusive, of appellant's abstract, and is worthy of great scrutiny and consideration. It is so replete with nothing. It is void.

It will be observed that this witness did not give his opinion of the value of one single holding of the Trading Company. He was asked if he "made an appraisement" of certain property, not the whole property, of the Trading Company. He testified "we" had made certain "appraisements."

The question at issue was not whether this man, or any one else, had made an appraisement of property. The question at issue was, what was its value. Counsel for appellee, with consummate skill, avoided asking him any such question, and he did not state such value. In fact, he was not competent, had he done so. He did not have any knowledge of the value of this property.

Now, what is the Court to think of that character of evidence? Counsel for appellee are clever lawyers, having the experience of years of wide practice. Yet not once was this witness asked to state the value of the assets of the Trading Company, and he did not state in his opinion, or otherwise, what

that valuation was; in fact, his testimony shows him to have been incompetent and unqualified. Can we believe that this was not designedly so arranged? Can we believe if the assets of the Trading Company were less than shown on the books, at the date of this assignment, that this would not have been clearly demonstrated by competent evidence? Why was it not done? Appellant was in no position to furnish evidence of such value on the date in question. Appellant had the right to rely upon the books of such corporation to prove its assets. If the books are correct, and Kirberger says they are, then the Trading Company was clearly solvent at the date of this assignment.

The burden of proof was upon the appellee to show by clear and positive evidence that the Trading Company was insolvent at the date of this transfer. This he has wholly failed to do. On the contrary, he has shown it to have been clearly solvent. Not only did appellee fail to prove the value of the assets of the Trading Company, but an inventory, which was taken in February, 1914, was not produced. Kirberger explained that he "had forgotten it" (pg. 278, abstract). Strange the appellee did not produce. The bank pass book was likewise forgotten (pg. 290, abstract). Strange the appellee did not produce it. produced, but evidence of material facts were "forgotten." A laundry man, who did not claim to have any better knowledge of the value of property in Southern Alaska than the "average man," was called as a witness to prove value, and he was not honored

by even asking his judgment of the value of the assets of the Trading Company. The idea of an expert witness is, that he is supposed to qualify by showing that his knowledge is greater than the average man. What the average man knows about the assets of the Trading Company, we will not presume to venture an opinion. We do express the belief that, as a legal proposition, Mr. Jaegar was not a competent witness to testify as to values. Surely, this oral testimony as to what appraisement was made is not competent. The law requires the appointment of three appraisers in bankruptcy proceedings, and the result of such appraisement reduced to writing and filed with the Referee in Bankruptcy. The contents of such writing, when such contents are material, can be proven only by the writing, or a certified copy thereof. We submit, however, that the contents of such appraisement would not be material evidence in this case against the appellant. Appellant was entitled to have the testimony of a competent witness on that subject, and the right to cross examine him. The appraisement made by appraisers appointed by Referee in Bankruptcy would not be entitled to any greater weight than the assessment roll for taxes. This is universally held not to be competent evidence to prove value. But taking the evidence of Kirberger on value. He states (pg. 278,abstract) that he took an inventory, and later on, says it was the same as shown on his books. But forgot to bring it. He says it was taken in February, 1914.

We then have the judgment of Kirberger that in February, 1914, the assets of the Trading Company aggregated $34,182.85, and the liabilities less than $19,000.00.

We, therefore, assert with confidence that the record shows at the date of this assignment in question, the Trading Company was clearly solvent, and in holding it to have been insolvent, the Court below clearly erred. If solvent, then appellant is entitled to a decree as prayed for.

NO EVIDENCE OF THE FILING OF ANY CLAIM AGAINST ESTATE OF BANKRUPT

There is no evidence whatever showing, or tending to show, that any creditor of the Trading Company, or any person whomsoever, filed or presented for filing, any claim against such corporation with the Referee in Bankruptcy. There was no evidence whatever offered on this point, and it, naturally, follows, as a corollary thereto, that there was no evidence offered showing, or tending to show, that the assets of such corporation were insufficient to pay claims filed against such estate. It logically follows that if there were sufficient of the assets of the Trading Company to satisfy and discharge its indebtedness, the Trustee in Bankruptcy would have no right to maintain this suit. This question was squarely before the Supreme Court of the State of

Wisconsin, in Mueller v. Bruss, et al., 112 Wis. 406; 88 N. W. 229, where Bardeen, Justice, says:

> "A third proposition is that the trustee cannot maintain this action unless it is shown by the complaint that he has not sufficient assets in his hands to satisfy the claims of the creditors of the debtor. No such showing is made in the complaint. For all that appears therein, there may be money and property enough in his hands to pay every claim filed against the debtor. The conveyances attacked were good between the parties thereto. Third parties are not allowed to impeach them unless it is necessary to do so in order that justice may be done. The trustee has no right superior to that of the creditors he represents. If we admit that the facts stated show such transfers to have been fraudulent, still no right to avoid them exists unless it appears that some one was harmed. It seems quite evident, without argument, that, unless it is made to appear that the property so conveyed is needed to pay the claims filed against the **debtor**, the trustee has no right to set such conveyances aside."

We made no objections to either of the complaints on this ground; but we did, in the Court below, and do now, make the contention that the appellee has wholly failed to establish the above

state of facts, and, consequently, cannot maintain this suit, and this Court is powerless to do other than to grant the appellant the decree prayed for.

VIII.

JUDGMENT

Should the Court hold against us on the proposition we have heretofore suggested, we submit the Court surely erred in the amount of the judgment awarded. It is claimed by the appellee that the indebtedness of the Packing Co. to the Trading Company, at the date of the transfer of the assets of the Packing Co. to appellant, was $10,333.31. The Court awarded judgment against the appellant far two thirds of that sum, on the theory that the value of the assets was at that time $60,000.00, and the indebtedness was $90,000.00. Therefore, the Trading Company was entitled to only 66 2-3 per cent. on the dollar of its claim.

It seems clear to us that this conclusion is inequitable and against the law and facts of the case. The record shows that Kirberger clearly and explicitly, both by assignment and letter, informed and represented to appellant, that the total of the indebtedness of the Packing Co. to the Trading Company, at such time, was only $8582.21. This was the understanding of all the parties. It was upon this representation and understanding that appellant advanced $81,177.18 as the purchase price of such assets. Now, to permit the representative of the

Trading Company to show that such indebtedness was greater than what all parties agreed and understood it to be is unjust and unfair, and entirely overlooks the well established doctrine of equitable estoppel. It is conceded that the books of the Packing Co. showed an indebtedness to the Trading Company in the sum of $8582.21 only, and that the president and general manager and owner of all the stock in the Trading Company represented such books to be correct in this particular. Under such state of facts, the Trading Company and its representative and its creditors are surely estopped from claiming a larger sum. This would fix the limit of appellee's recovery to $5,721.47.

IX.

INTEREST.

In addition to the sum awarded appellee, the court awarded it interest from May 12, 1914, at 6 per cent. per annum until paid. The judgment was entered May 24, 1916. This interest amounted at that date to the not insignificant sum of $414.70.

In awarding appellee interest, the lower Court undoubtedly overlooked the case of Sargent v. American Bank & Trust Co., 80 Or. 45-46, and Richardson v. Investment Co., 66 Or. 353-358, where it is held that, under the laws of Oregon, interest can be recovered only where an express promise is made to pay same, or where interest is expressly allowed by statute.

It is most unfortunate, indeed, that it was deemed necessary that the appellant should have been subjected to the humiliation of being charged with the acts of fraud and dishonesty found in the pleadings on the part of appellee. It is, indeed, remarkable that such charges should have been made, when the evidence is considered.

It is difficult to believe that these charges of fraud were purposely, deliberately, and maliciously made, for the purpose of prejudicing the Court against the appellant and the co-defendants, men of the highest standing, both socially and financially, yet, regretting the necessity, we feel fully justified in saying that, in our judgment, these false and libelous charges were so made. We have no hesitancy, however, in saying that charges of such character injure rather than aid the parties making them in suits before a Court.

We respectfully submit that the decree of the Court below was erroneous, and that appellant is entitled to a decree as prayed for.

G. C. & A. C. FULTON,

Attorneys for Appellant.